The regulation of agricultural land in South Africa:
A legal comparative perspective

by
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Dissertation presented in partial fulfilment of the requirements for the degree of Doctor of Laws at Stellenbosch University

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March 2020

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Summary

After 25 years of democracy, the legacy of land dispossession has not been redressed. The unequal distribution of agricultural land in South Africa is a direct consequence of the racially discriminatory laws, policies and practices which were in place for the largest part of the twentieth century. Accordingly, one of the key challenges the post-1994 government faced was how to address the unequal distribution of land – in general, but also specifically in relation to land for agricultural purposes.

While there is consensus on the need for redistribution of agricultural land, much controversy persists around *how* to redistribute land so as to meet the various objectives, including a more equitable and diversified distribution of land ownership, food security, sustainability, affordability and effective implementation of relevant measures, undergirded by constitutionality. Accordingly, the question is not whether South Africa should pursue agricultural land reform, but rather *how* South Africa should go about it, specifically concerning the drafting and implementation of pertinent policy and legislative measures. In this process agricultural productivity, development and food security may not be compromised and mechanisms employed have to be aligned with constitutional imperatives, including the parameters provided for in the property clause, section 25 of the Constitution. The overarching aim of this dissertation is therefore to consider the regulation of agricultural land in South Africa from a land reform, specifically redistribution, perspective in order to assess whether current mechanisms employed as well as envisaged mechanisms are aligned with the Constitution, whether the approaches to acquiring agricultural land, flowing from the extant and envisaged regulatory framework, are likewise constitutional and whether, combined, an effective legal framework for redistribution in South Africa exists. With respect to the latter, efficacy for purposes of this study is linked to the legal dimension only and is not focussed on agricultural resources and components – in the broadest sense.

For purposes of this dissertation, a comparative perspective is useful. It may be insightful to consider how Namibia and India (a) conceptualise the concept of agricultural land; (b) regulate agricultural land for redistribution purposes; (c) acquire agricultural land for redistribution and; (d) redistribute agricultural land.

In light of the above, various recommendations are made, relating to a: (a) proposed definition of “agricultural land”; (b) legal framework for the regulation of agricultural land; and (c) legal framework for the redistribution of agricultural land in South Africa.

Opsomming

Vyf en twintig jaar na die aanvang van die demokratiese bedeling in Suid-Afrika, is die nalatenskap van grondontneming steeds voortslepend. Die ongelyke verdeling van landbougrond in Suid-Afrika is ‘n direkte gevolg van die rasgebaseerde en diskriminerende wette, beleide en praktyke wat vir die grootste deel van die twintigste eeu in plek was. Gevolglik was een van die belangrikste uitdagings wat die regering ná 1994 gehad het, die aanspreek van die ongelyke verdeling van grond – in die algemeen, maar spesifiek ook met betrekking tot grond vir landboudoeleindes. Daar is konsensus oor die noodsaaklikheid van herverdeling van landbougrond, maar daar is kontroversie oor die wyse waarop die grond hervderdeel moet word ten einde die uiteenlopende oogmerke, insluitend ‘n meer billike en verteenwoordigende eiendomsregprofiel ten aansien van grond, voedselsekerheid, volhoubaarheid, beskostigbaarheid en effektiewe implementering van toepaslike maatreëls, onderliggend aan grondwetlikheid, te bereik. Daarom is die vraag nie soseer óf Suid-Afrika grondhervorming van landbougrond moet beywer nie, maar eerder hóe te werk gegaan moet word, rakende die opstel en implementering van toepaslike beleidsdokumente en statutêre maatreëls. Landbouproduktiwiteit, ontwikkeling en voedselsekerheid mag nie deur die grondhervormingsproses in gedrang gebring word nie en die meganismes wat gebruik word moet belyn wees met grondwetlike imperatiewe, insluitend die parameters wat in die eiendomsklousule, artikel 25 van die Grondwet, beliggaam word.

Die oorkoepelende doel van hierdie proefskrif is dus om die regulering van landbougrond in Suid-Afrika te oorweeg vanuit ‘n grondhervorming-, spesifiek herverdelings, perspektief ten einde te bepaal of die bestaande meganismes wat gebruik word asook voorgestelde meganismes, belyn is met die Grondwet, of die benaderings tot die verkryging van landbougrond wat vloei uit die huidige sowel as die voorgestelde regsraamwerk eweneens grondwetlik is, en of dit as ‘n geheel ‘n doeltreffende regsraamwerk vir herverdeling in Suid-Afrika daarstel. Ten opsigte van die laasgenoemde is die fokus van hierdie studie slegs die regsdimensie en is daar nie op landbouhulpbronne en -komponente – in die breedste sin – gefokus nie.

'n Regsvergelykende perspektief is ook nuttig vir doeleindes van hierdie proefskrif. Dit kan insiggwend wees om ondersoek in te stel hoe Namibië en Indië (a) "landbougrond" definieer (of konseptualiseer); (b) landbougrond reguleer vir herverdelingsdoeleindes; (c) landbougrond vir herverdelingsdoeleiendes verkry en; (d) landbougrond herverdeel.

In lig van die bogenoemde word ‘n verskeidenheid aanbevelings gemaak, insluitend ‘n: (a) voorgestelde definisie van “landbougrond”; (b) regsraamwerk vir die regulering van landbougrond; en (c) regsraamwerk vir die herverdeling van landbougrond in Suid-Afrika.

Acknowledgements

First and foremost, I would like to express my gratitude to my promotor Prof Juanita Pienaar without which this dissertation would not have realised. Thank you for your patient and valuable guidance throughout this rewarding endeavour. I am indebted to you, your enthusiastic encouragement and your unparalleled ability to turn a phrase. “Prof, jy is jou goud werd. Wat klaar is, is [uiteindelik] klaar”.

Secondly, I would also like to thank the Faculty of Law for awarding me the Dean’s bursary which allowed me to pursue my doctoral studies without any financial hardship.

Thirdly, I wish to thank and express my gratitude to the following people in particular:

To my parents, Cobus and Magda Kotzé (who are also alumni of Stellenbosch University): I am immensely proud to call you my parents and extremely grateful for your love, undying encouragement and sacrifices you have made in order for me to pursue my dreams. Do what you love, and you will never work a day in your life. Thank you also to my other family members: My cousin, Ebeth Marais; my second mom, Elma Marais and my last living grandparent, Ouma Elizabeth (Bettie) Hoon for your prayers, love and support (especially in the form of comfort food).

To the friends (old and new) that became family (some of whom are family), in no particular order: Thank you, Sergio Gama and the Gama Family; Mareli Booysen; Steyn and Ju-Mari Kotzé; the Kenchington’s including, Grant and Leah, Jeanna, Dee and Barry; Kate and Chris Schofield; Matthew Holliday; Jake and Charné Antonakis; Richard and Bernadette (almost) Poulton; Remo Oberzaucher; Gareth Wheeler and Emily Webb; Harriet (Koala) Harding; Deborah Lishman; Ernst Heydenrych; Gretchen Adams; Ashleigh Farquharson; Liline Steyn; Sabrina Thompson; Safraaz Ganie; Rebecca (Becky) and Hanna McNaught; Sameera Mahomedy; Michael Foxcroft; Ferdinand Botha; Natalie Meyer; Annemarie Strohwald; Katrien van Aswegen; Michael Arthur; Bianca Wallendorf and Nicola Matthee for enforcing a measure of balance into my life, your kindness and/or believing in me when I did not.

Lastly, (and excuse my broken Portuguese) ao meu amor, Sérgio Miguel Moreira Gama: Meu coração, obrigado por seu amor e apoio incondicional e inabalável. A vida é sobre a jornada não o destino. E este é apenas o começo.

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Chapter 1: Introduction

1 Research problem

The unequal distribution of agricultural land in South Africa is a direct consequence of the racially discriminatory laws,[1] policies and practices, which were in place for the largest part of the twentieth century.[2] Accordingly, one of the key challenges the post-1994 government faced was *how* to address the unequal distribution of land – in general,[3] but also specifically in relation to land for agricultural purposes.[4]

After 25 years of democracy, the legacy of land dispossession has not been redressed.[5] In this regard, recent legislative developments in South Africa reiterate that:

> "…there is a need to redistribute agricultural land more equally by race and class, raise agricultural output and food security and to advance social justice and political stability by obtaining agricultural land to support and promote productive employment and income to poor and efficient small scale farmers".[6]

[1] JM Pienaar *Land Reform* (2014) 80, 94, 375; Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 30-07-2019) 23-25; Report of the High Level Panel on the Assessment of key legislation and the acceleration of fundamental change (November 2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf> (accessed 06-06-2018) 29. For example, the Natives Land Act 27 of 1913 subsequently renamed the Black Land Act 27 of 1913, the Native Trust and Land Act 18 of 1936 subsequently renamed the Development Trust and Land Act 18 of 1936, the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966. Together, the Natives Land Act and the Native Trust and Land Act can be regarded as forming significant cornerstones of apartheid. See T Fenyes, C van Rooyen & N Vink "Reassessment of the Land Acts of 1913 and 1936" (1990) *Development Southern Africa* 583-589 in this regard. See further HJ Kloppers & GJ Pienaar "The historical context of land reform in South Africa and early policies" (2014) 17 *Potchefstroom Electronic Law Journal* 677-706 680-684 and L Robinson "Rationales for rural land redistribution in South Africa" (1997) *Brooklyn Journal of International Law* 465-504, 472. For a discussion of the historical context of the Natives Land Act 18 of 1936, see P Wickins "The Natives Land Act of 1913: A cautionary essay on simple explanations of complex change" (1981) *South African Journal of Economics* 105-129; H Feinberg "The Natives Land Act of 1913 in South Africa: Politics, race and segregation in the early 20th century" (1993) *International Journal of African Historical Studies* 65-109. For a general discussion of land initiatives between 1913 and 1948, see H Feinberg "Black South African initiatives and the land: 1913-1948" (2009) *Journal for Contemporary History* 39-61.

[2] Kloppers & Pienaar (2014) *PELJ* 677; L Ntsebeza & R Hall (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 3; Pienaar *Land Reform* 80-136.

[3] A general lack of access to land existed in relation to residential, business, trade, commercial and agricultural purposes. In other words: a general need for access to the broad spectrum of land usage.

[4] Ntsebeza & Hall *The Land Question in South Africa* 3.

[5] Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 5.

[6] Preamble of the Regulation of Agricultural Land Holdings Bill *GG* 40697 of 17-03-2017.

In this regard, there is consensus on the need and justification for redistribution of agricultural land, [7] but much controversy persists around *how* to redistribute land so as to meet the various objectives of land reform, including a more equitable and diversified distribution of land ownership, constitutionality of, food security, sustainability, affordability and effective implementation of relevant measures.[8] Accordingly, the question is not *whether* South Africa should pursue agricultural land reform, but rather *how* South Africa should go about doing it, specifically concerning the drafting and implementation of pertinent policy and legislative measures.[9] In this process agricultural productivity, development and food security may not be compromised and mechanisms employed have to be aligned with constitutional imperatives, including the parameters provided for in the property clause, section 25 of the Constitution.[10]

Ultimately, the overarching aim of this dissertation is to consider the regulation of agricultural land in South Africa from a land reform, specifically redistribution, perspective in order to assess whether current mechanisms employed as well as envisaged mechanisms are aligned with the Constitution, whether the approaches to acquiring agricultural land, flowing from the regulatory framework, are likewise constitutional and whether, combined, an effective legal framework for redistribution in South Africa exists. With respect to the latter, efficacy for purposes of this study is linked to the legal dimension only and is not focussed on agricultural resources – in the broadest sense.[11]

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[7] HP Binswanger-Mkhize, C Bourguignon & R van den Brink "Introduction and summary" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 3-42, 4, 7-8.

[8] Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 5. See also Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 5; Pienaar *Land Reform* 360.

[9] Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21.

[10] Section 25(1) of the Constitution of the Republic of South Africa, 1996; Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 5.

[11] Efficacy for agricultural purposes may encompass various factors, including climate, natural resources, soil classifications, agricultural inputs, markets, financial and economic considerations, agricultural tools and implements and transport infrastructure. Though important, these factors fall outside the scope of the study. See Department of Agriculture, Forestry and Fisheries, *Agricultural productivity in South Africa: Literature review* (March 2011) 1-29, 9; SG Mahule *Exploration of contributing factors leading to a decrease in agricultural productivity in restituted farms of Ehlanzeni District Mpumalanga Province* Master's thesis, Stellenbosch University (2015); BK Abrha *Factors affecting agricultural production in Tigray Region, Northern Ethiopia* DPhil thesis, University of South Africa (2015); B Sultan "Global warming threatens agricultural productivity in Africa and South Asia" (2012) 7 *Environmental Research Letters* 1-3; APA Vink *Land Use in Advancing Agriculture* (1975); DB Lobell, W Schlenker & J Costa-Roberts "Climate trends and global crop production since 1980" (2011) 333 *Science* 616-620 and T Folnovic *"*Factors that affect agricultural productivity*"* (11-03-2015) *Agrivi* <https://www.blog.agrivi.com/post/factors-that-affect-agricultural-productivity> (accessed 17-06-2017).

2 Background and context

2 1 Land reform within a constitutional context

There is no universal concept of land reform.[12] The concept of land reform relates to the aims or goals which the land reform programme aims to achieve. The concept of land reform depends on the jurisdiction and the relevant context, in particular the land issues pertinent to a specific jurisdiction given its historical background.[13] Furthermore, the underlying reasons for the need to implement land reform guides the approaches and mechanisms to achieve the aims or goals of the land reform programme.[14] In its most basic form,[15] the concept of land reform can be defined as:

> "[T]he redistribution of property or rights in land for the benefit of the landless, tenants and farm labourers".[16]

Land reform has often been equated with agrarian reform.[17] For example, in the *Green Paper on Land Reform*[18] the terms "land reform" and "agrarian transformation" are used interchangeably. However, as set out in the *Land Reform Report* of the Advisory Panel for Agriculture and Land Reform in 2019:

> "Agrarian reform is a much wider concept than land reform [redistribution]. It includes changing access to land (redistribution) and the terms of access (tenure) but goes much further. Agrarian reform involves restructuring patterns of landholding; access to other natural resources like water, as well as capital, inputs, support services and markets. Agrarian reform should change the size [and] distribution of landholdings; land uses and types of crops/livestock; production technologies…and market structures and incentives…".[19]

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[12] Pienaar *Land Reform* 11, 816.
[13] 11-12.
[14] 12.
[15] This definition is too restrictive for the land reform programme that was embarked on in South Africa. The South African land reform programme also includes restitution and tenure security. See section 25(5)-25(9) of the Constitution of the Republic of South Africa, 1996.
[16] M Adams "Land reform: New seeds on old ground" (1995) *Overseas Development Institute* 1 <http://www.odi.org.uk/resources/docs/2979.pdf> (accessed 13-08-2019); Pienaar *Land Reform* 12.
[17] Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 16.
[18] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011.
[19] Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 16; Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 4.

Moreover, land reform has also been described as reforms that "aim to increase the ability of persons to access land and to vest secure rights in relation to land".[20]

Within the South African constitutional context, land reform is embedded in the Constitution,[21] specifically the property clause, which envisages a land reform programme broadly consisting of three legs[22] constituting restitution,[23] tenure security[24] and land redistribution.[25] Under these programmes, various legislative measures have been

[20] Pienaar *Land Reform* 14.
[21] Sections 25(4)-(9) of the Constitution of the Republic of South Africa, 1996; Pienaar *Land Reform* 167.
[22] Pienaar *Land Reform* 19, 821. See also Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) which highlights the importance of a fourth leg of land reform, namely Land administration. Land administration is also necessary for the successful implementation of the land reform programme. Land administration usually encompasses land survey, deeds and registries. However, these elements are not incorporated in section 25 of the Constitution of the Republic of South Africa, 1996 as such. See further Kloppers & Pienaar (2014) *PELJ* 677-678; JM Pienaar "Land reform embedded in the Constitution: Legal contextualisation" (2015) 114 *Scriptura* 1-20 7, 12. The creation of the Ministry of Rural Development and Land Reform in 2009 established a ministry dedicated to the social and economic development of rural areas in South Africa. In this regard, the Department of Rural Development and Land Reform, *Comprehensive Rural Development Programme* (12 August 2009), which is also part and parcel of the Department of Rural Development and Land Reform, *Rural Development Framework Policy* (24 July 2013), is aimed specifically at addressing poverty and food insecurity by the creation of vibrant, equitable and sustainable rural communities. Accordingly, the focus on rural land development widens the scope of land reform to include land development. In this regard, see further section 1 of the Property Valuation Act 17 of 2014, where "land reform" is defined as "land redistribution, land restitution, *land development* and tenure reform" (my emphasis), which in effect broadens up the scope of land reform in South Africa and adds a fourth leg to the three sub-programmes.
[23] Section 25(7) of the Constitution of the Republic of South Africa, 1996 states that "[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress". This subsection essentially embodies the restitution programme and aims to provide equitable redress to a person or community dispossessed of property after 19 June 1913. See the Restitution of Land Rights Act 22 of 1994 and the Restitution of Land Rights Amendment Act 15 of 2014. However, the Constitutional Court in *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 5 SA 635 (CC) declared the Restitution of Land Rights Amendment Act invalid. See also Pienaar (2015) *Scriptura* 13-14 and Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 27.
[24] Section 25(6) of the Constitution of the Republic of South Africa, 1996 states that "a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress". This is in effect the tenure reform programme which entails changing or adjusting the basis on which control is held over land so that it is stronger and better protected against interference. See the Upgrading of Land Tenure Rights 112 of 1991; the Land Titles Adjustment 111 of 1993; the Ingonyama Trust Act 3 of 1994; the Land Reform (Labour Tenants) 3 of 1996; the Communal Property Associations Act 28 of 1996; the Interim Protection of Informal Rights Act 31 of 1996; the Extension of Security of Tenure Act 62 of 1997; the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998; the Traditional Leadership and Governance Framework Act 41 of 2003; the Communal Land Rights 11 of 2004. See also Pienaar (2015) *Scriptura* 13 and Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 28-30.
[25] Section 25(5) of the Constitution of the Republic of South Africa, 1996 provides that the State has a constitutional duty to take "reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis". See in this regard the Land Reform: Provision of Land and Assistance Act 126 of 1993. See further AJ van der Walt *Property and Constitution* (2012) 12; E Lahiff "Land redistribution in South Africa" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 169-200, 170; P Jacobs, E Lahiff & R Hall "Evaluating land and agrarian reform in South Africa: Land redistribution" (2003) *Cape Town: PLAAS, University of the Western Cape* <https://www.africaportal.org/publications/evaluating-

promulgated to give effect to the respective objectives of restitution, tenure security and land redistribution. Having a land reform programme embedded in the Constitution has important implications.[26] It makes the property clause in the Constitution rather unique,[27] compared to other jurisdictions that have embarked on land reform programmes.[28]

In this regard, the property clause[29] makes provision for two seemingly broad and contradictory parts.[30] Firstly, it makes provision for the protection of existing property rights and interests against unconstitutional interferences[31] and secondly, it mandates and provides the government with the necessary authority to promote land reform.[32] The incorporation of land reform and other reform measures within section 25 indicates that the property clause is aimed at finding an equitable balance between the protection of private property on the one hand and "the promotion of a public interest which includes the reform of the property regime",[33] on the other. In other words, having the land reform programme embedded in the property clause also impacts "on how the property clause is to be interpreted".[34] What is needed is a purposive interpretation of the property clause and of measures promulgated in light of section 25.[35] Section 25 should be applied in "such a way

land-and-agrarian-reform-in-south-africa-land-redistribution/> (accessed 27-09-2019); Pienaar *Land Reform* 168.

[26] Pienaar (2015) *Scriptura* 2, 14-16 specifically discusses the implications of having land reform embedded in the Constitution. See also Pienaar *Land Reform* 820-822; Van der Walt *Property and Constitution* 12; R Hall "Transforming rural South Africa? Taking stock of land reform" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 87-106.

[27] Pienaar *Land Reform* 174-175.

[28] For example, both Namibia and India provide for land reform programmes, albeit not in its respective Constitutions. See Chapter 7 1 and Chapter 8 1 in this regard.

[29] For information regarding the historical development and structure of section 25 of the Constitution of the Republic of South Africa, 1996 see M Chaskelson "Stumbling towards section 28: Negotiations over the protection of property in the interim Constitution" (1995) 11 *South African Journal of Human Rights* 222-240; L Ntsebeza "Land redistribution in South Africa: The property clause revisited" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 107-131; CG van der Merwe & JM Pienaar "Land reform in South Africa" in P Jackson & DC Wilde (eds) *Reform of Property Law* (1997) 358; Pienaar *Land Reform* 167-191.

[30] Pienaar *Land Reform* 174; SRA Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* LLM, University of Cape Town (2014) 17.

[31] Sections 25(1)-(3) of the Constitution of the Republic of South Africa, 1996; Pienaar *Land Reform* 174-175; AJ van der Walt *Constitutional Property Law* 3 ed (2011) 12, 16.

[32] Sections 25(4)-(9) of the Constitution of the Republic of South Africa, 1996; Pienaar *Land Reform* 175, 365 where Pienaar describes section 25 as a "two-sided sword"; Van der Walt *Constitutional Property Law* 12.

[33] Pienaar *Land Reform* 182; section 25(4) of the Constitution of the Republic of South Africa, 1996. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 798 (CC) para 50 where the Constitutional Court held that section 25: "has to be seen both as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions." See also *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 61-62.

[34] Pienaar *Land Reform* 175.

[35] Van der Walt *Constitutional Property Law* 3.

that both the protective and the reformative purposes of the clause are respected, promoted and fulfilled".[36]

The purpose of the second part of the property clause[37] is not only to "legitimate and to promote land reform and related reforms",[38] but also to allow for "the general reform or redevelopment of property law".[39] In this regard, it may be argued that the "restructuring of property law…and land reform measures and designs may bring about the changes"[40] needed to address the inequalities in relation to land ownership and land use.[41] In this regard, Van der Walt explains that:

> "[T]raditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to…public-purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests".[42]

In light of the historical racially based approach to land, particularly agricultural land, "land reform also embodies a sense of justice and fairness".[43] In this regard, the land reform programme aims to achieve restorative and redistributive justice.[44] Importantly, "the land reform programme does not embody retributive justice".[45] Retributive justice entails:

> "…punitive justice where persons are punished in the process of transformation and reform on the basis of their participation in unfair, unlawful or discriminatory practices or on the basis of their benefitting from them. Retributive justice was excluded due to the fact that the land reform

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[36] Pienaar *Land Reform* 175.
[37] Sections 25(5)-25(9) of the Constitution of the Republic of South Africa, 1996.
[38] Pienaar *Land Reform* 176.
[39] 176.
[40] 168.
[41] Kloppers & Pienaar (2014) *PELJ* 707. See also S Tsawu *An historical overview and evaluation of the sustainability of the Land Redistribution for Agricultural Development (LRAD) programme in SA* LLM, Stellenbosch University (2006) 1-2 and Pienaar *Land Reform* 375.
[42] AJ van der Walt *Property in the Margins* (2009) 16. See also Van der Walt *Property and Constitution* 12 and Pienaar *Land Reform* 820.
[43] Pienaar *Land Reform* 822. See also JM Pienaar "Land reform and restitution in South Africa: An embodiment of justice?" in J de Ville (ed) *Memory and Meaning: Lourens du Plessis and the haunting of justice* (2015) 141-160, 150-158.
[44] Pienaar "Land reform and restitution in South Africa: An embodiment of justice?" in *Memory and Meaning: Lourens du Plessis and the haunting of justice* 150-158.
[45] *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC) para 137. See also Pienaar *Land Reform* 823; Pienaar "Land Reform and restitution in South Africa: An embodiment of justice?" in *Memory and Meaning: Lourens du Plessis and the haunting of justice* 157.

> programme was the product of negotiated settlement, which, concerning property, is also reflected in section 25(1) and (2) of the Constitution."[46]

"Restorative justice is aimed at historical redress",[47] which is "especially relevant with respect to the restitution programme".[48] The restitution programme can be described as "close-ended"[49] and forms a more concise part of the overall land reform programme. Redistributive justice, while it is also aimed at historical redress, is specifically linked to present "inequalities and existing needs".[50] In this regard, the redistribution and tenure security programmes differ from the restitution programme because it encompasses both historic or restorative and redistributive redress "by dealing with present-day inequalities, which are largely ascribed to the former, pre-constitutional approach to land".[51]

Importantly, for purposes of this dissertation the focus falls particularly on the *redistribution programme*. The concept of redistribution, in light of the South African Constitution is explored further in the following section.

2 2 Access to land and redistribution

The constitutional mandate to redistribute land is found in section 25(5) of the Constitution.[52] Section 25(5) of the Constitution provides that:

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

Two aspects of this constitutional mandate require further clarification. Firstly, section 25(5) of the Constitution is the only provision in the property clause that specifically refers to citizens. In this regard, African people were not only denied access to agricultural land in general, but were also divested of their South African citizenship, by being limited to reside

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[46] Pienaar *Land Reform* 823.
[47] 822.
[48] Pienaar *Land Reform* 822-823; Pienaar "Land Reform and restitution in South Africa: An embodiment of justice?" in *Memory and Meaning: Lourens du Plessis and the haunting of justice* 157.
[49] Pienaar *Land Reform* 272.
[50] Pienaar *Land Reform* 822. It is close-ended because the requirements have been set out clearly in the Restitution of Land Rights Act 22 of 1994. See also the *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 5 SA 635 (CC) which declared the Restitution of Land Rights Amendment Act 15 of 2014 invalid. Furthermore, the legislation clearly identifies the applicants and beneficiaries under the Act. See also Chapter 9 of Pienaar *Land Reform*, which specifically provides for an in-depth exposition of the restitution programme.
[51] Pienaar *Land Reform* 273.
[52] 273.

in the so-called homelands.[53] The land assigned to Africans in the homelands was the least fertile and hardly sufficient for grazing or subsistence, let alone, small- or large-scale farming.[54] Accordingly, the land generally allocated to Africans was not sufficient for them to earn a livelihood from it.[55] In terms of section 25(5) of the Constitution, any citizen in principle, should have access to land and to this end access to land has to be broadened.[56] Secondly, section 25(5) does not guarantee or constitute a (fundamental) *right to land*.[57] While broadening access to land includes obtaining rights in relation to the land, it does not guarantee ownership as such. Moreover, it does not guarantee that everyone or every citizen will receive land.[58] In this regard it is important to understand that there is a finite amount of agricultural land in South Africa, which may be State-owned or privately-owned.[59]

Instead, "access" within the section 25(5) context refers to "opening up"[60] land in order to derive some benefit from it. Similarly, a person would have the ability to derive or the possibility of deriving benefit from the land. "Access" to land does not provide for a (clear) right to derive a benefit from the land.[61] In terms of the redistribution programme questions pertaining to *who* should benefit; *how* such a person, entity, community or institution may qualify to benefit; *what* the benefits should be and *when* or *in which circumstances* the benefits would accrue, arise.[62] These questions need to be addressed in legislation and policy measures.

Importantly, "broadening access to land" and "redistribution" are not necessarily identical or synonymous.[63] The 1997 *White Paper on South African Land Policy* ("*White Paper*") states that:

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[53] *Daniels v Scribante* 2017 4 SA 341 (CC) para 21.
[54] Para 21.
[55] *Daniels v Scribante* 2017 4 SA 341 (CC) para 21.
[56] Pienaar *Land Reform* 274.
[57] 283.
[58] Pienaar *Land Reform* 283. See in general JC Ribot & NL Peruso "A theory of access" (2003) 68 *Rural Sociology* 153-181.
[59] However, despite various attempts, there is still no accurate data on how much land is State-owned and privately-owned. Thus far two land audits in 2013 and in 2017 were conducted by the Department of Rural Development and Land Reform. See Department of Rural Development and Land Reform, *Land Audit on State-Owned Land* (February 2013) <http://www.ruraldevelopment.gov.za/phocadownload/Cadastral-Survey-management/Booklet/land%20audit%20booklet.pdf> (accessed 15-08-2019); Department of Rural Development and Land Reform, *Land Audit Report, Phase II: Private land ownership by raced, gender and nationality* (November 2017) <file:///C:/Users/tinakotze/Downloads/land_audit_report13feb2018.pdf> (accessed 15-08-2019). Furthermore, another land audit was also conducted by AgriSA and the Land Centre of Excellence. See AgriSA, Land Centre of Excellence *Land Audit: A transactions approach* (November 2017).
[60] Pienaar *Land Reform* 283; Ribot & Peruso (2003) *Rural Sociology* 153-181.
[61] Ribot & Peruso (2003) *Rural Sociology* 153-181; Pienaar *Land Reform* 283.
[62] Pienaar *Land Reform* 283.
[63] 283-284.

> "The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods…Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers".[64]

While the broad aims of the redistribution programme include broadening access to residential and agricultural land,[65] a specific target was set of redistributing 30% of agricultural land in white ownership to beneficiaries in the redistribution programme by 2014.[66] In light of this target, "redistribution", is primarily aimed at altering ownership patterns. While "broadening access to land" may include altering land ownership patterns, it is a wider concept. In this regard, other options such as providing limited real rights in the form of a lease, for example, may also broaden access to land.[67] Accordingly, an emphasis on leasehold, for example, as a means of broadening access to land will not contribute to reaching the 30% target because ownership of the land remains vested in the State. Only in instances where the lease is connected to the option to purchase and the purchase is indeed successful will it contribute to adjusting land ownership patterns and achieving the 30% target.[68]

Importantly, redistribution and broadening access to land is not limited to rural and/or agricultural land only.[69] The *White Paper*[70] specifically provided that access to land has to be broadened in relation to rural and urban contexts.[71] To this extent, the land redistribution programme requires that "legislation has to be drafted and other steps have to be taken specifically to effect access"[72] to *all* land.[73] For purposes of this dissertation, the focus is on

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[64] Department of Land Affairs, *The White Paper on South African Land Policy* (1997).
[65] Department of Land Affairs, *The White Paper on South African Land Policy* (1997).
[66] Pienaar *Land Reform* 346; Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 12.
[67] Pienaar *Land Reform* 283, 346-347.
[68] 346-347.
[69] Pienaar *Land Reform* 142-153, 286. Importantly, not all rural land or areas constitutes agricultural land. In this regard, agricultural land can be viewed as a *subset* of rural land. See Chapter 2 below where the concept of agricultural land in South Africa is dealt with. However, see Chapter 10, 3 1 where it is proposed that agricultural land should be defined in accordance with the purpose for which it is or can be used, as opposed to where it is situated.
[70] Department of Land Affairs, *The White Paper on South African Land Policy* (1997).
[71] Department of Land Affairs, *The White Paper on South African Land Policy* (1997) 32, 35; Pienaar *Land Reform* 286; Pienaar *Land Reform* 346; Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 17-18.
[72] Department of Land Affairs, *The White Paper on South African Land Policy* (1997) 32, 35.
[73] Rural (including agricultural) and urban land. In general, a rural area or countryside is a geographic area that is located outside towns and cities. As mentioned, agricultural land, although it forms part of rural land, should rather be regarded as a narrower category of land i.e. a subset of rural land. Urban land or urban areas encompasses human settlement with high population density and infrastructure of built environment. Urban areas are created through urbanization and are categorized by urban morphology as cities, towns, conurbations or suburbs.

broadening access to rural, in particular, "agricultural land".[74] The legislation that aims to give effect to section 25(5) of the Constitution to provide access to land specifically is the Land Reform: Provision of Land and Assistance Act 126 of 1993. In terms of this Act the Minister may acquire and designate land and develop such land for purposes of small-scale farming, residential, public, community and business or similar purposes[75] and provide funds for land purchase.[76] However, the details of the redistribution programme, such as who the beneficiaries are; the respective qualifying and selection criteria for beneficiaries; and the type of land rights they may acquire, are found in a variety of arguably incoherent policy documents.[77] Recent legislative developments, such as the draft Regulation of Agricultural Landholdings Bill,[78] also provide for regulatory mechanisms which may contribute to making agricultural land available for redistribution purposes.

In light of the background provided, the inquiry of this dissertation is twofold: (a) to what extent may the South African government interfere with and regulate private property rights in relation to agricultural land for redistribution purposes; and (b) how should the South African government regulate, acquire and redistribute agricultural land to promote land reform, particularly achieving redistribution goals, without impeding agricultural productivity? The former question entails a determination of whether the legislative and policy measures employed to regulate agricultural land are constitutional, whereas the latter question explores different options for the regulation, acquisition and redistribution of agricultural land in South Africa. As explained, ultimately, the question is whether the South African government can regulate agricultural land as proposed and set out in legislation and policy and whether, or in what way, the regulation of agricultural land may contribute to the redistribution of agricultural land in South Africa.

3 Research aims

The Constitution in general, and the property clause in particular, provide the constitutional framework for the regulation of agricultural land in South Africa. In this regard, the research aims to provide for an overview of the constitutional framework within which the regulation

[74] Pienaar (2015) *Scriptura* 13. See Chapter 2 below in general.
[75] Section 3 of the Land Reform: Provision of Land and Assistance Act 126 of 1993.
[76] Section 10 of the Land Reform: Provision of Land and Assistance Act 126 of 1993.
[77] See Chapter 5, 2 3 – 2 5 below.
[78] The Regulation of Agricultural Land Holdings Bill *GG* 40697 of 17-03-2017.

and acquisition of agricultural land functions from a land reform, particularly redistribution, perspective.

In light of the need to broaden access to agricultural land[79] and to address the "inequalities in relation to *agricultural land* ownership and land use",[80] it is necessary to determine *what* constitutes agricultural land in South Africa. This is the case because "agricultural land" may be defined differently in a variety of legislative measures, for different purposes. Various pieces of legislation, bills and policies, with varied objectives, provide for seemingly different definitions of what agricultural land entails. While these definitions may differ within each context, there is still the need for the definitions to provide clarity in respect of which land specifically will be affected under which regulatory measure(s). In this regard, the dissertation aims to interpret and establish what constitutes agricultural land in South Africa. It also aims to determine if a different concept of agricultural land should not be provided for in legislation or policy.

Once it has been established what possibly constitutes agricultural land, the focus shifts to the regulation of agricultural land specifically. For purposes of this study regulation of agricultural land is deemed to be the various mechanisms that provide for, regulate the use of and impact agricultural land including envisaged or suggested mechanisms. While there may be other mechanisms regulating or impacting agricultural land in general,[81] and within the context of redistribution,[82] the particular mechanisms explored for purposes of this dissertation include: (a) provisions relating to the subdivision of agricultural land; and (b) restrictions on the amount of land a person or entity may own (more commonly known as "land ceilings"). With respect to foreign (or non-citizens) land owners a further mechanism is explored, namely (c) restrictions on the acquisition and disposal of agricultural land.

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[79] Section 25(5) of the Constitution of the Republic of South Africa, 1996; Preamble of the Regulation of Agricultural Land Holdings Bill.

[80] My emphasis. Kloppers & Pienaar (2014) *PELJ* Abstract. See also Tsawu *An historical overview and evaluation of the sustainability of the LRAD programme in SA* 1-2 and Pienaar *Land Reform* 375.

[81] For instance: the Spatial Planning and Land Use Management Act 16 of 2013; the Expropriation Act 63 of 1975; the Land Reform (Labour Tenants) Act 3 of 1996; the Extension of Security of Tenure Act 62 of 1997; the Restitution of Land Rights Act 22 of 1994; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Land Reform: Provision of Land and Assistance Act 126 of 1993; the Subdivision of Agricultural Land Act 70 of 1970; the Environmental Conservation Act 73 of 1989; the National Environmental Management Act 107 of 1998; the National Environmental Management Act: Protected Areas 57 of 2003; the Conservation of Agricultural Resources Act 43 of 1983; the Agricultural Pests Act 36 of 1983; the National Veld and Forest Fire Act 101 of 1998; and the Fencing Act 31 of 1963.

[82] See for example, the Spatial Planning and Land Use Management Act 16 of 2013; the Expropriation Act 63 of 1975; the Land Reform (Labour Tenants) Act 3 of 1996; the Extension of Security of Tenure Act 62 of 1997; the Restitution of Land Rights Act 22 of 1994; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; and the Land Reform: Provision of Land and Assistance Act 126 of 1993.

These regulatory mechanisms not only impact an owner's entitlements in relation to agricultural land, but may potentially also make more agricultural land available for redistribution purposes**.** Forming part and parcel of this study is thus an analysis of mechanisms for the regulation of agricultural land in South Africa. As mentioned above,[83] the mechanisms employed have to be aligned with constitutional imperatives, including the parameters provided for in the property clause, section 25 of the Constitution.[84] These regulatory mechanisms may restrict or deprive an owner of his or her ownership entitlements.[85] Any restriction on the owner's right to property or ownership entitlements needs to comply with the provisions of the Constitution. Section 25(1) of the Constitution provides that:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

The Constitution provides for deprivation of property and sets out the requirements that must be met in order for a deprivation to be constitutionally valid.[86] In other words, section 25(1) creates a framework for the legitimate regulation of property.[87] Before it can be determined whether the regulatory mechanisms are constitutional, the methodology for determining whether the implementation of a regulatory mechanism constitutes an arbitrary deprivation must be set out first. To this end, the methodology as set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,[88] ("*FNB*") will be employed to determine whether the imposition of the regulatory mechanism passes constitutional muster.[89]

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[83] See 1 above.
[84] Section 25(1) of the Constitution of the Republic of South Africa, 1996.
[85] AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016) 47-50 provides that the content of ownership must be determined within the context of each individual case. The content of ownership may include several entitlements, notably the entitlement to use (*ius utendi*), dispose or alienate (*ius dispondendi*) and vindicate (*ius vindicandi*) the property. Other entitlements may include the entitlement to fruits (*ius fruendi*), to possess (*ius possidendi*), to resist any unlawful invasion (*ius negandi*), encumber and (under some circumstances) even to neglect or destroy the property (*ius abutendi*). Compare H Mostert & A Pope (eds) *The Principles of the Law of Property* (2010) 92-93; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 92-93; CG van der Merwe *Sakereg* 2 ed (1989) 173.
[86] Van der Walt *Constitutional Property Law* 17, 214, 218 and 251; AJ van der Walt "Transformative constitutionalism and the development of South African property law (part 2)" (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 1-31; Van der Walt & Pienaar *Introduction to the Law of Property* 345-346.
[87] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD, Stellenbosch University (2015) 128.
[88] 2002 4 SA 768 (CC).
[89] The following cases subsequently followed the *FNB* methodology: *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC); *Offit*

By regulating agricultural land effectively and employing the mechanisms provided for, arguably more or better suited agricultural land may be made available or become available for redistribution purposes. Therefore, also linked to the regulation of agricultural land, is the acquisition thereof. To some extent, the methods for acquiring sufficient land, most notably expropriation, have always been contentious.[90] To this end, the research aims to provide for an exposition of the different approaches to acquiring agricultural land, including market-led approaches and expropriation (with or without compensation). Forming part and parcel of the acquisition of agricultural land for land reform purposes is the redistribution thereof. In this regard, there are numerous policies and schemes which provide for different qualifying and selection criteria of beneficiaries. The beneficiaries also acquire different types of rights in relation to the land acquired under the redistribution programme, depending on the policy.

Having set out the legal position pertaining to (a) the concept of agricultural land; (b) the regulation of agricultural land; and (c) the acquisition of agricultural land in South Africa, the dissertation also aims to provide for a preliminary reflection on the efficacy of the redistribution programme; the extent to which the regulatory mechanisms discussed in Chapter 3[91] may promote or contribute to the redistribution process as a whole; and the most suitable approach in acquiring agricultural land for redistribution purposes.

The research also aims to provide for a comparative perspective dealing with the following themes: (a) the concept of agricultural land; (b) the regulation of agricultural land; (c) the acquisition of agricultural land; and (d) the redistribution of agricultural land. The focus falls on Namibia and India as jurisdictions of comparative analysis.[92] The comparison of these foreign jurisdictions may assist in exposing the difficulties or challenges and failures in

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Enterprises v Coega Development Corporation (Pty) Ltd 2011 1 SA 293 (CC); *National Credit Regulator v Opperman* 2013 2 SA 1 (CC); *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC). See further Van der Walt *Constitutional Property Law* 222; Van der Sijde *Reconsidering the relationship between property and regulation* 110. See also T Roux "Property" in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (RS 2009, OS 2003) 46-1-46-37, 46-4; EJ Marais "Expanding the contours of the constitutional property concept" (2016) *Tydskrif vir die Suid-Afrikaanse Reg* 576-592, 592 where Marais states that *Shoprite* "confirms that *FNB* is still the leading judgment when it comes to adjudicating section 25 disputes, since the three legal questions set out by the majority accord with the first three steps in the *FNB* case methodology". See also FJ Michelman & EJ Marais "A constitutional vision for property: *Shoprite Checkers* and beyond" in G Muller, R Brits, B Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in honour of AJ van der Walt* (2018) 121-146 and BV Slade & R Walsh "The marginality of property in expropriation law: A comparative assessment " in G Muller, R Brits, B Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in honour of AJ van der Walt* (2018) 21-50.

[90] Pienaar *Land Reform* 226, 360.

[91] Chapter 3 provides for an exposition of the regulatory mechanisms available for the regulation of agricultural land in South Africa.

[92] See 4 2 below.

conceptualising, regulating, acquiring and redistributing agricultural land. The comparative perspective may provide for recommendations with regard to a proposed framework for the regulation, acquisition and redistribution of agricultural land within the South African constitutional context.

4 Research methodology

4 1 Introduction

The nature of the study requires a literature-based analysis of primary and secondary legal sources: the former comprising an analysis and/or discussion of relevant legislation, bills, policies and case law and the latter comprising a discussion of relevant text books, journal articles and commentaries. In this regard, the dissertation will primarily rely on legislation, bills and policy documents[93] to provide an exposition of a definition of agricultural land and the regulation, acquisition and redistribution of agricultural land in South Africa. Case law pertaining to the regulation of agricultural land will only be considered where necessary and relevant.

4 2 Comparative jurisdictions

For purposes of this dissertation, a comparative perspective is useful. While the Constitutions and the historical context of land redistribution programmes may vary greatly from country to country, important lessons can be gained from their experiences in either regulating or acquiring agricultural land, while taking into account South Africa's particular circumstances.

As mentioned, the choice of comparative jurisdictions for purposes of this dissertation will be limited to Namibia and India. Both jurisdictions provide for redistribution programmes, albeit not in its respective Constitutions, to address the unequal distribution of ownership of agricultural land. It may be insightful to consider how Namibia and India (a) conceptualise the concept of agricultural land; (b) regulate agricultural land for redistribution purposes; (c) acquire agricultural land for redistribution; and (d) redistribute agricultural land in view of the fact that these two jurisdictions implemented their redistributions programmes before the advent of the new constitutional dispensation in South Africa. Accordingly, the dissertation aims to provide for a comparative perspective by scrutinising relevant legislative measures, jurisprudence and legal developments, specifically with regard to the concept of agricultural

[93] Details regarding the redistribution programme are not found in legislation but rather in policy measures.

land; the regulatory mechanisms that may open up land for redistribution purposes; the different approaches to acquiring such land and eventually redistributing said land.

4 2 1 Namibia

South Africa and Namibia are not only neighbouring countries but are also unique choices for comparative study because they share similar backgrounds of colonialism and race-based minority rule, characterised by extensive land appropriation.[94] Both countries also experienced negotiated settlements whereby new political dispensations were established in terms of which respective Constitutions provide for the protection of property rights in principle.[95]

Although the content and scope of the protection of property rights and corresponding land reform measures differ, it is notable that South Africa and Namibia initially undertook a market-led approach to the acquisition of land for redistributive purposes. For various reasons and in different time periods, these countries have already moved or are currently moving away from the initial market-based approach.[96] In this regard, the Constitution of

[94] See generally SK Amoo *Property Law in Namibia* (2014) 13-16, 224-226; D Shriver "Rectifying land ownership disparities through expropriation: Why recent land reform measures in Namibia are unconstitutional and unnecessary" (2006) 15 *Transnational Law and Contemporary Problems* 419-455 422-425; M Tong "Decolonisation and comparative land reform with a special focus on Africa" (2014) 9 *International Journal of African Renaissance Studies* 16-35 17-20; P Mufune "Land reform management in Namibia, South Africa and Zimbabwe: a comparative perspective" (2010) 6 *International Journal of Rural Management* 1-31 8-19; S Kariuki "Political compromise on land reform: A study of South Africa and Namibia" (2007) 14 *South African Journal of International Affairs* 99-114 99-103; S Pazcakavambwa & V Hungwe "Land redistribution in Zimbabwe" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 137-167, 137; R Hall "A comparative analysis of land reform in South Africa and Zimbabwe" in MC Lee & K Colvard (eds) *Unfinished Business: The Land Crisis in Southern Africa* (2003) 256.

[95] Section 25 of the Constitution of the Republic of South Africa, 1996 and section 16 of the Constitution of the Republic of Namibia respectively. See Pienaar *Land Reform* 815-831; Amoo *Property Law in Namibia* 224-234; Shriver (2006) 15 *Transnational Law and Contemporary Problems* 422-425; Tong (2014) *International Journal of African Renaissance Studies* 17-20; Mufune (2010) 6 *International Journal of Rural Management* 8-19; Kariuki (2007) *South African Journal of International Affairs* 99-103; Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution* 137; Hall "A comparative analysis of land reform in South Africa and Zimbabwe" in *Unfinished Business: The Land Crisis in Southern Africa* 256.

[96] B Mynhart *Expropriation: Comparing the Namibian position with those of Zimbabwe and South Africa in respect of just compensation and public interest* LLB dissertation, University of Namibia (2011); Dlamini *Taking land reform seriously: From willing-selling-willing buyer to expropriation* 44-56 where the author reviews the willing-seller willing-buyer approach to land redistribution in South Africa. He also examines the implementation thereof in Namibia and Zimbabwe. See further NN Angula *Land reform: A critical analysis of the willing-seller-willing buyer policy as a mode of acquiring commercial land and the categorization of the beneficiaries and their ability to pay back the Agribank loan* LLB dissertation, University of Namibia (2007); MP Sebola & JP Tsheola "Economics of agricultural land restitution and redistribution in South Africa: Willing buyer, willing seller business imperatives versus socio-political transformation?" (2014) 46 *Journal of Human Ecology* 113-123; Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution* 137; Hall "A comparative analysis of land reform in South Africa and Zimbabwe" in *Unfinished Business: The Land Crisis in Southern Africa* 256.

each jurisdiction makes provision for the acquisition of land through expropriation.[97] Accordingly, forming part of the study is the respective regulatory approaches in the various jurisdictions regarding agricultural land and the relevant land reform goals, including the acquisition of agricultural land.

While South Africa and Namibia are comparable given the shared historical backgrounds and consequent need for redistribution of agricultural land,[98] other factors, such as the vast difference in population numbers in South Africa and Namibia; the amount of arable agricultural land; climate and rainfall due to the two jurisdictions' topography, must also be kept in mind.[99]

4 2 2 India

Like South Africa, India shares a history of British colonial rule. At independence in 1947, India inherited an ineffective agricultural system characterised by insecure tenancies, small uneconomic land holdings and inequality in land ownership.[100] In the decades following India's independence, a significant body of land reform legislation was passed, dealing with, *inter alia*:

> "(1) abolishing intermediate interests in land, (2) regulating tenancy, (3) limiting the size of landholdings and redistributing the above-ceiling surplus, and (4) distributing government wasteland to those without agricultural land and houses."[101]

While India is an important comparative case study for land reform in general, it is their experience with land ceiling regulation, primarily aimed at redistributing surplus land to the poor, landless and marginal farmers,[102] which is specifically relevant for purposes of this

[97] Section 25(2) of the Constitution of Republic of South Africa, 1996; section 16(2) of the Constitution of the Republic of Namibia and section 16 of the Constitution of Zimbabwe. See also in general Mynhart *Expropriation: Comparing the Namibian position with those of Zimbabwe and South Africa in respect of just compensation and public interest*; Dlamini *Taking land reform seriously: from willing-selling-willing buyer to expropriation;* Angula *Land reform: A critical analysis of the willing-seller-willing buyer policy as a mode of acquiring commercial land*; Sebola & Tsheola (2014) *Journal of Human Ecology* 113-123; Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution* 137.
[98] JM Pienaar "Willing-seller-willing-buyer and expropriations as land reform tools: What can South Africa learn from the Namibian experience?" (2018) 10 *Namibian Law Journal* 41-64, 43.
[99] Pienaar (2018) *Namibian Law Journal* 63.
[100] T Hanstad, R Nielsen, D Vhugen & T Haque "Learning from old and new approaches to land reform in India" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (date) 241 242-243.
[101] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 242, 244-251. T Besley & R Burgress "Land reform, poverty reduction and growth: Evidence from India" (2000) 115 *The Quarterly Journal of Economics* 389-430.
[102] Besley & Burgress (2000) *The Quarterly Journal of Economics* 389-430.

dissertation. Similar to the envisaged South African framework,[103] land ceiling legislation adopted and implemented by all the States in India placed limitations (or ceilings) on the amount of agricultural land a person or family may own.[104] While basic points of departure are similar, important differences exist, for example, variations on several key aspects, including the ceiling area, compensation for above-ceiling land expropriation and defining, and prioritising beneficiaries.[105] Apart from a few exceptions, it is evident that the land ceiling legislation in India has not lived up to expectations.[106] The imposition of ceilings has generally not resulted in any meaningful redistribution of agricultural land, but instead, aggravated India's existing problem of uneconomical fragmentised land holdings, which in turn, has led to a decline in agricultural productivity.

Given that India is a federal state with 29 States each with their own legislation regulating agricultural land ceilings,[107] it is not within the scope of this dissertation to discuss every State's land ceiling measures. In this regard, the 2013 Agricultural Land Holding Policy

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[103] Department of Rural Development and Land Reform, *Agricultural Landholding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013); the Regulation of Agricultural Land Holdings Bill. See also Chapter 3, 3 3 below.

[104] The Urban Land (Ceilings and Regulation) Act 33 of 1976. However, see the Urban Land (Ceiling and Regulation) Repeal Act 15 of 1999. See also BD Acharya *The Indian Urban Land Ceiling Act: A critique of the 1976 Legislation* (1989) <http://documents.worldbank.org/curated/en/631451468750264120/pdf/multi-page.pdf> 39-51; DB Acharya *Policy of Land Acquisition and Development: Analysis of an Indian experience* <http://documents.worldbank.org/curated/en/631451468750264120/pdf/multi-page.pdf> 99-116; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247.

[105] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248; PS Appu *Land Reforms in India: A Survey of Policy, Legislation and Implementation* (1996); NC Behuria *Land Reform Legislations in India: A Comparative Study* (1997); CD Deecre & M Leon *Empowering Women* (2001); G Gopal "Gender and economic inequality in India: The legal connection" (1993) 13 *Boston College Third World Law Journal* 63-86 for an exposition of key aspects focused on in India. The identified beneficiaries are seemingly women and the poor. See further the Regulation of Agricultural Land Holdings Bill where the focus is not only on the poor. The Bill identifies black people as beneficiaries of agricultural land. Accordingly, while both India and South Africa's ceilings legislation and policies focus on the redistribution of agricultural land for the poor, the South African perspective differs because the redistribution of agricultural land is also linked to race.

[106] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.
See also Acharya "The Indian Urban Land Ceiling Act: A critique of the 1976 Legislation" <http://documents.worldbank.org/curated/en/631451468750264120/pdf/multi-page.pdf> (accessed 28-05-2017) 39-51.

[107] See the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; the Gujarat Agricultural Lands Ceiling Act 27 of 1961; the Haryana Ceiling on Landholding Act 26 of 1972; the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; the Karnataka Land Reforms Act 10 of 1962; the Kerala Land Reforms Act 1 of 1964; the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; the Orissa Land Reforms Act 16 of 1960; the Punjab Land Reforms Act 10 of 1973; the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and the West Bengal Land Reforms Act 10 of 1965.

Framework[108] identifies West Bengal as being of particular importance[109] for the South African position in relation to the formulation and implementation of proposed ceilings legislation.[110] Accordingly, the insights drawn from the experience of the States in India which successfully implemented land ceiling legislation will be important for guidance in establishing a clearly formulated legal and institutional framework for land ceilings in South Africa. Ultimately, South Africa may learn from the shortfalls experienced by land ceilings legislation and policy in India in order to formulate and implement effective regulation of agricultural land.[111]

4 2 3 Conclusion

The insights drawn from the difficulties, failures and successes of these jurisdictions' redistribution programmes may provide guidance and proposals for the way in which South Africa conceptualises or defines agricultural land and regulates, acquires and redistributes such land to the extent that it may be accommodated within the South African constitutional dispensation.

5 Overview of chapters

This dissertation consists of three parts. Part one, consisting of Chapters 2 to 6, sets out the South African position in relation to (a) the concept of agricultural land; (b) the mechanisms for the regulation of agricultural land; (c) the constitutionality of the mechanisms discussed; (d) the approaches to acquiring agricultural land for redistribution purposes; and (e) a preliminary reflection pertaining to the redistribution programme as a whole in South Africa.

Part two of the study embodies a legal comparative dimension. As mentioned above, the choice of jurisdictions for this comparative element to the study is limited to Namibia and India. Part two also provides for a thematic comparative perspective dealing with (a) the concept of agricultural land; (b) the regulation of agricultural land; (c) the acquisition of

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[108] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013).

[109] The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5 identifies West Bengal, Kerala and Jammu & Kashmir as achieving some measure of success with the implementation of its land ceiling policy, although the policy does not set out the basis for determining the success of the individual States; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247.

[110] See Chapter 3, 3 3 3 below.

[111] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.

agricultural land; and (d) the redistribution of agricultural land in Namibia, India and South Africa.

The final part of this dissertation, part three, will provide for conclusions and recommendations in light of the study. Accordingly, in total, this dissertation consists of ten chapters, this one being the introduction and Chapter 10 being the conclusion.

Chapter 2 aims to determine what constitutes agricultural land in South Africa and its implications for broadening access to land and redistribution. Because different legislative frameworks and policies provide or allude to a definition of agricultural land, these measures are explored specifically in chapter 2: (a) the Subdivision of Agricultural Land Act 70 of 1970; (b) the Preservation and Development of Agricultural Land: Policy Framework and corresponding Bill; and (c) the Regulation of Agricultural Land Holdings Bill.

Chapter 3 provides for an exposition of existing and newly proposed regulatory mechanisms in relation to agricultural land in South Africa in view of the land reform programme, specifically the redistribution programme.[112] In this regard, "regulatory mechanism" for purposes of this study includes mechanisms that provide for the regulation of the use and promotion of agricultural land and how such mechanisms may impact agricultural land. While there may be other mechanisms regulating or impacting agricultural land in general, and within the context of redistribution the particular mechanisms explored for purposes of this dissertation include: (a) provisions relating to the subdivision of agricultural land; (b) restrictions on the amount of agricultural land an owner may own (known as land ceilings) and; (c) restrictions pertaining to foreign ownership of agricultural land. These regulatory mechanisms not only impact an owner's entitlements in relation to agricultural land, but may also make more agricultural land available for redistribution purposes. These regulatory mechanisms are explored in light of (a) the underlying motivation for regulation; (b) the constitutionality; and (c) the overall efficacy thereof. While Chapter 3 only provides for an exposition of these regulatory measures and the underlying reason for such regulation, the subsequent chapters deal with the constitutionality and efficacy of the mechanisms.

Consequently, Chapter 4 aims to determine whether the imposition of regulatory measures, namely (a) restrictions on the subdivision of agricultural land; (b) limiting the amount of land

[112] Excluding land tax or property tax measures and mechanisms such as the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997 which regulates and may impact an landowner's entitlements and may open up land for redistribution purposes.

any person may own; and (c) the restrictions imposed on foreigners in relation to the disposal and acquisition of agricultural land, is constitutional. Before this determination can be made, the methodology for determining whether the implementation of a regulatory mechanism constitutes an arbitrary deprivation must be set out. To this end, the methodology as set out in *FNB,*[113] will be employed to determine whether the imposition thereof amounts to an arbitrary deprivation of property.

Chapter 5 provides for an overview of the approaches to acquiring agricultural land for redistribution purposes. Although both State-owned and privately owned land may be available for redistribution, the manner of acquiring the land, specifically agricultural land, may differ depending on whether it is State or private land. For example, where State-owned land is already in the hands of the State to redistribute, land may have to be transferred from one department or Minister to another before it may be redistributed to the intended beneficiaries. Such a process will not involve market-led approaches or expropriation. However, where privately-owned land has to be acquired for redistribution purposes, different acquisition approaches, including market-led approaches and expropriation may be used. The focus, for purposes of this chapter, falls on the different ways of acquiring *private* agricultural land for redistribution. Such approaches include a discussion of market-led approaches, expropriation (with or without compensation) and confiscation.

Having set out the legal position pertaining to (a) the concept of agricultural land; (b) the regulation of agricultural; and (c) the acquisition of agricultural land in South Africa, Chapter 6 aims to provide some preliminary thoughts on the efficacy of the redistribution as a whole; the extent to which the regulatory mechanisms discussed in Chapter 3 may promote or contribute to the redistribution process as a whole; and the most suitable approach in acquiring agricultural land for redistribution purposes.

The following chapters provide for an exposition of (a) the concept of agricultural land; (b) the regulation of agricultural land; and (c) the acquisition of agricultural for redistribution purposes in Namibia (Chapter 7) and India (Chapter 8). Later in the study, Chapter 9 will provide for a comparative perspective between South Africa, Namibia and India regarding the concept of agricultural land; mechanisms for the regulation of agricultural land; approaches for the acquisition of agricultural land and the redistribution thereof. Therefore,

[113] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

Chapters 7 and 8 are thus essential in laying the foundational basis for an in-depth legal comparative analysis to follow.

Chapter 9 provides for such a comparative perspective and follows a thematic methodology to compare the legal position(s) pertaining to (a) the concept of agricultural land; (b) the mechanisms for the regulation of agricultural land; (c) the mechanisms or approaches for the acquisition of agricultural land; and (d) the redistribution in South Africa, Namibia and India. The comparison between Namibia, India and South Africa not only exposes the difficulties and failures, but also provide insights that are integral in providing guidance and proposals for the way in which South Africa could conceptualise, regulate, acquire and redistribute agricultural land, to the extent that it may be accommodated within the South African constitutional dispensation. It is in this light that the last chapter aims to suggest recommendations pertaining to the conceptualisation, regulation, acquisition and redistribution of agricultural land in the South African context.

Chapter 2: The concept of agricultural land in South Africa

1 Introduction

The preamble of the Regulation of Agricultural Land Holdings Bill[1] ("Regulation Bill") states specifically that in order to gain access to land on an equitable basis "there is a need to redistribute *agricultural land* more equally by race and class".[2] In light of the need to broaden access to agricultural land[3] and to address the "inequalities in relation to *agricultural land* ownership and land use",[4] it is necessary to determine *what* constitutes agricultural land in South Africa. In this regard, "agricultural land" may be defined differently in a variety of legislative measures, for different purposes. While there is no single definition of agricultural land, various pieces of legislation, bills and policies, with varied objectives, provide for seemingly different definitions of what agricultural land entails. While these definitions may differ within each context, there is still the need for the definitions to provide clarity in respect of which land specifically will be affected under which regulatory measure.

Accordingly, the following measures are discussed in chronological order, starting with the pre-constitutional legislative measure, the Subdivision of Agricultural Land Act 70 of 1970 ("SALA"). SALA is also dealt with first, in light of the body of case law dealing with the interpretation of "agricultural land" in South Africa before and after the advent of the constitutional dispensation. This discussion is followed by an exposition of the concept of agricultural land as set out in the 2016 Preservation and Development of Agricultural Land Bill[5] and corresponding policy[6] and the 2017 Regulation Bill. These legislative measures are also discussed in chapter 3, dealing with mechanisms for the regulation of agricultural land in South Africa.

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[1] The Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.
[2] Preamble of the Regulation of Agricultural Land Holdings Bill.
[3] Section 25(5) of the Constitution of the Republic of South Africa, 1996; Preamble of the Regulation of Agricultural Land Holdings Bill *GG* 40697 of 17-03-2017.
[4] My emphasis. HJ Kloppers & GJ Pienaar "The historical context of land reform in South Africa and early policies" (2014) 17 *Potchefstroom Electronic Law Journal* 677-706, 677. See also S Tsawu *An historical overview and evaluation of the sustainability of the Land Redistribution for Agricultural Development (LRAD) programme in SA* LLM, Stellenbosch University (2006) 23, 117-119.
1-2 and JM Pienaar *Land Reform* (2014) 375.
[5] Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016.
[6] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* in GN 210 *GG* 38545 of 13-03-2015.

2 The Subdivision of Agricultural Land Act 70 of 1970

2 1 Introduction

SALA aims to protect agriculture as an economic activity by preventing the subdivision of large-scale agricultural land into small, uneconomic land parcels.[7] It also prevents prime agricultural land from decreasing due to the expansion of townships and urban sprawl.[8] In this regard, SALA restricts the subdivision of agricultural land and the acquisition of undivided shares in agricultural land except where the Minister has given permission to do so.[9] Since its promulgation, all agricultural subdivisions have been and continue to be regulated by this Act.[10]

Importantly, SALA is therefore not only a source which provides a definition of agricultural land – it is also a regulatory mechanism[11] that impacts particular entitlements of land owners.[12]

2 2 The definition of agricultural land

The definition of agricultural land turns on the interpretation of SALA.[13] In terms of SALA, agricultural land is not specifically defined.[14] Instead, SALA defines agricultural land as a

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[7] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 448J-449B; Pienaar *Land Reform* 350; J van Wyk *Planning Law* 2 ed (2012) 380. See also G Frantz *Repealing the Subdivision of Agricultural Land Act: A constitutional analysis* LLM thesis, Stellenbosch University (2010) in general.

[8] Pienaar *Land Reform* 350; Van Wyk *Planning Law* 380; Frantz *Repealing the Subdivision of Agricultural Land Act* 1.

[9] Sections 3-4 of the Subdivision of Agricultural Land Act 70 of 1970. See also Van Wyk *Planning Law* 380.

[10] Despite having passed the Subdivision of Agricultural Land Act Repeal Act 64 of 1998 it has not been put into operation. Accordingly, SALA still regulates the subdivision of agricultural land in South Africa. See 3 3 3 below.

[11] See Chapter 3, 3 2 below.

[12] The content of ownership must be determined within the context of each individual case. Ownership may include several entitlements, notably the entitlement to use (*ius utendi*), dispose or alienate (*ius dispondendi*) and vindicate (*ius vindicandi*) the property. Other entitlements may include the entitlement to fruits (*ius fruendi*); to possess (*ius possidendi*), to resist any unlawful invasion (*ius negandi*), encumber and (under some circumstances) even neglect or destroy the property (*ius abutendi*). Compare H Mostert & A Pope (eds) *The Principles of the Law of Property* (2010) 92-93; AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016) 47-48; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 92-93; CG van der Merwe *Sakereg* 2 ed (1989) 173. As the Subdivision of Agricultural Land Act 70 of 1970 prohibits the subdivision of agricultural land without ministerial consent, it restricts the owner's power to freely use and alienate his or her property. Hence, potentially resulting in limitation of property in terms of section 25(1).

[13] Frantz *Repealing the Subdivision of Agricultural Land Act* 30-31.

[14] Section 1 of the Subdivision of Agricultural Land Act 70 of 1970; Van Wyk *Planning Law* 381; *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC). See CJ Nagel "The Subdivision of Agricultural Land Act 70 of 1970, options to purchase and related matters" (2016) 79 *Journal of Contemporary Roman-Dutch Law* 276-286; NJJ Olivier & C Williams "The decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd* (amicus curiae); *Minister of Agriculture and Land Affairs (intervening)* [2008] JOL 22099 (CC): case note" (2010) 35 *Journal for Juridical Science* 99-128 and N Steytler "The decisions in

"residual category"[15] that entails any land, but excluding: (a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee;[16] (b) land which is a township as defined in section 102(1) of the Deeds Registries Act 47 of 1937;[17] (c) "land of which the State is the owner or which is held in trust by the State or any Minister for any person;"[18] (d) land which the Minister after consultation with the executive committee of a province concerned, and by notice in the *Government Gazette* excludes from the provisions of the Act;[19] and (e) a number of other categories of land, often specific to particular provinces.[20] In other words, agricultural land is described as a residual category of land because it does not fall within the ambit of the (a)-(e) categories of land listed in section 1 of SALA.

The most significant of the exceptions listed above, is land situated in the area of jurisdiction of municipal, city or town councils or boards and land that is regarded as a township.[21] The definition was applicable before the new local government dispensation came into operation in 1993, "when agricultural land was situated outside the areas of jurisdiction of municipalities".[22] However, South Africa's transition to a democracy required the restructuring of local governments in order to rationalise the variety of local authorities in existence for the different population groups.[23] In this regard, the Local Government Transition Act 209 of 1993 ("LGTA") aimed to provide interim measures for the restructuring

Wary Holdings (Pty) Ltd and Another 2009 (1) SA 337 (CC): Be wary of these holdings" (2009) 2 *Constitutional Court Review* 429-448.

[15] Section 1 of the Subdivision of Agricultural Land Act 70 of 1970. The definition of "agricultural land" was substituted by section 1(a) of the Subdivision of Agricultural Amendment Act 55 of 1972 and also by Proclamation R100 of 31 October 1995. The insertion of the proviso is discussed below. See also Frantz *Repealing the Subdivision of Agricultural Land Act* 30.

[16] Section 1(a) of the Subdivision of Agricultural Land Act 70 of 1970.

[17] Section 1(b) of the Subdivision of Agricultural Land Act 70 of 1970.

[18] Section 1(c) of the Subdivision of Agricultural Land Act 70 of 1970. In other words, large tracts of land, including agricultural land, in the traditional or former national states and selfgoverning territories.

[19] Section 1(f) of the Subdivision of Agricultural Land Act 70 of 1970.

[20] Section 1(b) of the Subdivision of Agricultural Land Act 70 of 1970, which includes land which forms part of any area subdivided in terms of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 or which is a township as defined in section 102(1) of the Deeds Registries Act 47 of 1937, but excluding a private township as defined in section 1 of the Town Planning Ordinance, 1949, not situated in an area of jurisdiction or a development area referred to in paragraph (a) of the definition of agricultural land.

[21] Section 1(a) of the Subdivision of Agricultural Land Act 70 of 1970; Van Wyk *Planning Law* 381. This would include land in areas identified as urban prior to the municipal restructuring in 1993 in terms of the Local Government Transition Act 209 of 1993 and also peri-urban land that fell within the area of municipalities or town councils.

[22] J van Wyk "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SA Public Law* 545-562 548.

[23] Van Wyk *Planning Law* 381. See in general N Steytler & J de Visser "Local government" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 22-1 – 22-138 and N Steytler & J de Visser *Local Government Law of South Africa* (2008).

of local government.[24] The pre-interim phase provided for the appointment of temporary or transitional councils that would govern until the first democratic municipal elections took place on 29 May 1996. The interim phase commenced after the local elections of 1996 and lasted until the local elections of 5 December 2000 and the coming into operation of the Local Government: Municipal Structures Act 117 of 1998 ("Municipal Structures Act") on 1 February 1999. The establishment of a new local government system would be finalised once a comprehensive and integrated framework for the system of local government had been enacted.[25] During the interim phase, it was envisaged that transitional councils would be established.[26]

Accordingly, the definition of agricultural land was amended in 1995[27] to include the following proviso:[28]

> "Provided that land situated in the areas of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain agricultural land".[29]

The proviso in effect declared all agricultural land prior to the transitional period to retain that classification[30] and would therefore continue to be subject to the provisions of SALA.[31] However, when the Municipal Demarcation Act 27 of 1998 and the Municipal Structures Act were promulgated, it marked the end of the transitional period.[32] It was unclear whether the

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[24] Steytler & De Visser "Local government" in *CLOSA* 22-7 – 22-13.
[25] Sections 151(1) and 155 of the Constitution of the Republic of South Africa, 1996. The framework for the system of local government encompassed the following legislative measures: The Local Government: Municipal Demarcation Act 27 of 1998; Local Government: Municipal Structures Act 117 of 1998; Local Government: Municipal Electoral Act 27 of 2000; Local Government: Municipal Systems Act 32 of 2000: Local Government: Municipal Finance Management Act 56 of 2003; and the Local Government: Municipal Property Rates Act 6 of 2004. See also Steytler & De Visser "Local government" in *CLOSA* 22-12 – 22-13; Steytler & De Visser *Local Government Law of South Africa* and N Steytler "Strangulation of Local Governments" (2008) *Local Government Project* (Community Law Centre, University of Western Cape) <https://dullahomarinstitute.org.za/multilevel-govt/publications/strangulation-lg-4-march-08-ac.pdf> (accessed 07-09-2019) in general.
[26] Section 8 of the Local Government Transition Act 209 of 1993.
[27] Proclamation R100 of 1995, *GG* 16785, 31 October 1995. Van Wyk (2009) *SA Public Law* 548 states that: "This proviso was inserted into SALA on the day that local government elections under permanent municipal structures were held. Its interpretation is central in determining whether or not agricultural land was done away with when the new local government dispensation with its back-to-back/wall-to-wall municipalities came into being. "
[28] General Law Amendment Act 49 of 1996.
[29] Section 1 of the Subdivision of Agricultural Land Act 70 of 1970. See also *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 449B-449F.
[30] Frantz *Repealing the Subdivision of Agricultural Land Act* 31.
[31] 31.
[32] Sections 151(1) and 155 of the Constitution of the Republic of South Africa, 1996.

proviso was to remain in effect after the transitional period came to an end. In other words, it was unclear whether there was any land that did not fall within municipal jurisdiction when the new local government dispensation came into operation. If this had been the case, "agricultural land" as envisaged by SALA would no longer exist, rendering SALA inoperative.[33]

The promulgation of the Subdivision of Agricultural Land Act Repeal Act 64 of 1998 ("Repeal Act"), which never came into operation, created further uncertainty regarding the applicability of SALA.[34] As a result, the definition of agricultural land became contentious, which resulted in various disputes.[35]

The interpretation of the abovementioned proviso by the courts was central to the determination whether the category of "agricultural land" was abolished when the new local government dispensation, with its wall-to-wall municipalities, came into operation in 1999.[36] The interpretation and clarification by the courts constitutes not only a technicality as the specific category of land, namely "agricultural land", and how it is defined and classified has particular important implications for the regulation thereof. For example, if the land is not regarded as agricultural land, then the subdivision restrictions in terms of SALA do not apply. However, the interpretation of SALA by the courts has resulted in conflicting judgments regarding the applicability of SALA. Accordingly, each of these cases will be discussed below.

2 2 1 Kotzé v Minister van Landbou

The first case which had to decide the applicability of SALA in the context of the new local government dispensation was *Kotzé v Minister van Landbou*[37] ("*Kotzé*"). This case concerned the subdivision of a farm, which was co-owned by the applicants.[38] The application for subdivision of the farm was lodged in July 2001 with the local authority.[39] Subsequently, the applicants concluded a contract of sale for three undivided portions of the farm. However, the contract of sale was subject to a suspensive condition which stipulated that the sale of the portions of land was subject to the owners obtaining written consent for

[33] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T).
[34] Van Wyk (2009) *SA Public Law* 545.
[35] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T); *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC). See 2 2 1 – 2 2 3 below.
[36] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T); Van Wyk *Planning Law* 381.
[37] 2003 1 SA 445 (T); Van Wyk (2009) *SA Public Law* 55.
[38] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 447J.
[39] 448J-448A.

subdivision thereof from the relevant authorities.[40] Before obtaining consent, two of the buyers had paid deposits and the applicant proceeded to make improvements to the land.[41]

In November 2001, the applicants received consent from the local authority.[42] However, in January 2002, the applicants realised that they still required consent from the then Minister of Agriculture for the subdivision.[43] In this regard, the applicants contended that the consent from the Minister was unnecessary in light of the statutory and constitutional changes to local municipal structures.[44] In terms of the definition of "agricultural land" in SALA their farm was situated within the jurisdiction of a local authority (the Lephalele municipality) and would therefore not constitute agricultural land for purposes of the Act.[45]

Subsequently, the question before the Court was whether "agricultural land" as intended in SALA, still existed in South Africa.[46] If "agricultural land" ceased to exist, the parties would no longer require the consent of the Minister of Agriculture to subdivide their land.

From the outset, Van der Westhuizen J considered and examined the current status of SALA.[47] He considered the extent to which the Repeal Act has repealed SALA, if at all and found that it repealed SALA in its entirety. However, the judge concluded that the Repeal Act remained inoperative.[48] The judge reasoned that it was the intention of the legislature to keep SALA in operation until such time when appropriate regulatory measures could replace the practice of subdivision.[49] Consequently, on that basis SALA and its requirements continue to apply.[50]

Once it was established that SALA still remained operational, the Court proceeded to determine the scope of the Act in view of the new local government dispensation.[51] In this regard, Van der Westhuizen J had to determine whether agricultural land still existed in view

[40] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 448A.
[41] 448A-448B.
[42] 448C.
[43] 448 C-448D.
[44] 448C-448F.
[45] 448C-448F.
[46] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 447I, 449I-450A; Frantz *Repealing the Subdivision of Agricultural Land Act* 32.
[47] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 450C-450D.
[48] 450C-450I.
[49] 450C-450J.
[50] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 450C-450D; Frantz *Repealing the Subdivision of Agricultural Land Act* 33.
[51] 451B.

of the constitutional and statutory changes to the system of local government.[52] Frantz notes that:

> "The effect of this new system of local government would have subjected all land previously classified as agricultural land, to the exception in the Act's definition".[53]

If this was the case, SALA would be rendered practically ineffective. In particular, the Court held that this could not have been the intention of the legislature.[54] Accordingly, the Court held that SALA had to be interpreted to mean what it meant when it was promulgated[55] and its purpose did not fall away when the Constitution created a new functionality for local government.[56] If the regulation of subdivision of agricultural land was up to local government, differing or divergent policies and decision processes would result in contrast to the Act's agricultural policy that relates to the control and regulation of agricultural land.[57] In such circumstances, it would be impossible for the Minister to regulate agricultural policy. In this light, the Court held that this may have a negative impact on issues of agricultural reform and access.[58]

Although the Court in *obiter* remarked that it may be time for the legislature to repeal SALA,[59] it held that SALA would continue to apply until such a time when the legislature creates new legislation to regulate the practice of subdivision and/or finalises the repeal of the Act.[60] The Court concluded that any land classified as agricultural land prior to the election of the first transitional councils would retain that classification.[61] Accordingly, the Court found that agricultural land still existed for purposes of SALA. Therefore, the parties still required ministerial consent, as set out in section 3 of SALA, to fulfil the suspensive condition in the contract of sale.

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[52] Frantz *Repealing the Subdivision of Agricultural Land Act* 34.
[53] 34.
[54] *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) 454I-455C.
[55] 454I-455C.
[56] 456A-456I.
[57] 456A-456I.
[58] 456A-456I.
[59] 456H.
[60] 456H-457A.
[61] 456H-457A.

2 2 2 Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd

In *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd*[62] the parties concluded an agreement for the sale of land.[63] The land, which the appellant intended to use for industrial purposes, was however still zoned as agricultural land. Similar to the *Kotzé* case above, the respondent subsequently lodged an application for its rezoning and subdivision with the relevant local authority. Following this application, the appellant, duly aware of the possibility that the application could be rejected and undo the sale, took occupation of the land by way of a lease agreement.[64] The appellant started to prepare the land for its intended industrial use.[65] In August 2005, the local authority granted its approval subject to various conditions.[66]

The conditions required the respondent to effect substantial improvements relating to an access way, storm water drainage and other essential services on the land. In light of the costs the respondent would have to incur to effect these conditions, the respondent sought to increase the purchase price of the land. However, as could be expected, the appellant was not amenable to the increase in price. Consequently, the appellant sought an application declaring the contract binding between the two parties in the court *a quo*.[67] The respondent opposed this application and contended that the agreement of sale was invalid. In short, the court *a quo* found that the land was to be defined as agricultural land and that the lack of ministerial consent required by SALA rendered the agreement void. On this basis leave to appeal was granted.

The appeal also concerned the validity of the agreement of sale between the parties.[68] The issues on appeal[69] were whether the agreement offended against the provisions of (a) section 2(1) of the Alienation of Land Act 68 of 1981 (because it failed to record a material term upon which the parties had expressly agreed, namely that the sale was conditional upon the success of a subdivision and rezoning application to the local authority); and (b) whether the land was agricultural land as contemplated in the definition of “agricultural land”

[62] 2008 1 SA 654 (SCA).
[63] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) para 1.
[64] Para 3.
[65] Para 3.
[66] Para 3.
[67] The High Court decision was handed down on 26 January 2006 under *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* case no 5349/2005 (unreported).
[68] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) para 1.
[69] The same grounds for the validity of the agreement of sale was first raised in the High Court.

in section 1 of SALA, which excludes land within a municipal area.[70] For purposes of this chapter, the focus of the discussion falls on the second issue.[71]

Again, like in *Kotzé*, the second issue largely turned on the interpretation of the proviso in section 1 of SALA. In this regard, the Court essentially had to consider 2 questions: (a) whether the Nelson Mandela Metropolitan Municipality ("NMMM"), is a "municipal council," "city council" or "town council" within the meaning of section 1 of the definition of agricultural land in SALA; and (b) whether the land retained its original status as "agricultural land" by virtue of the proviso[72] in the definition of agricultural land notwithstanding the fact that the land now fell within the area of jurisdiction of a municipal council.[73]

With regard to the first question, it was common cause that the land fell under the jurisdiction of the NMMM, a category A municipality[74] in terms of section 2 of the Municipal Structures Act at the time of the conclusion of the sale agreement. Prior to the establishment of the NMMM, the land fell under the jurisdiction of the Port Elizabeth Transitional Rural Council as contemplated in section 1 of the Local Government Transition Act 209 of 1993. However, SALA fails to define the terms "municipal council", "city council" or "town council". In this regard, the Municipal Structures Act provides that:

> "…[w]ith effect from 5 December 2000 … any reference in a law referred to in item 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996…, to a municipal council, municipality, local authority or another applicable designation of a local government structure, must be construed as a reference to a municipal council or a municipality established in terms of this Act, as the case may be."[75]

In view of this section, the Supreme Court of Appeal held:

> "In terms of item 2 of Schedule 6 of the Constitution all law that was in force when the new Constitution took effect, continues in force, subject to any amendment or repeal and consistency

[70] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) para 4.
[71] See paras 6-12 for the court's judgment on the first issue.
[72] Proclamation R100 of 1995, *GG* 16785, 31 October 1995.
[73] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) para 15.
[74] Section 155(1) of the Constitution of the Republic of South Africa, 1996 provides for 3 categories of municipalities, category A, B and C municipalities. Category A, metropolitan municipalities, govern major cities. A category A municipality has exclusive municipal executive and legislative authority in its area. Category C municipalities, namely district municipalities, govern wider areas outside the major cities. These municipalities have municipal executive and legislative authority in an area that includes more than one municipality. Accordingly, district municipalities are further divided into category B, local municipalities. Category C municipalities share municipal executive and legislative authority in its area with a category C municipality within whose area it falls. See Steytler & De Visser "Local government" in *CLOSA* 22-16 – 22-24.
[75] Section 93(8) of the Municipal Structures Act 117 of 1998.

> with the new Constitution' and 'old order legislation does not have a wider application; territorially or otherwise, than it had before the [interim] Constitution took effect unless subsequently amended to have a wider application and continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution".[76]

Maya JA concluded that there could be no doubt that SALA constituted a piece of old order legislation envisaged by the Constitution and section 93(8) of the Municipal Structures Act. Accordingly, the Court found that the words "municipal council," "city council" or "town council" within the meaning of section 1 of the definition of agricultural land in SALA must be construed to include a category A municipality such as the NMMM.

With regard to the second question, the court *a quo*'s judgment traced the land back to a point in time where it would have been classified as agricultural land during the transitional period.[77] The High Court showed that the land would remain agricultural land notwithstanding any changes to the local government structures.[78] This conclusion was based on the reasoning in the *Kotzé* judgment.[79]

Counsel for the appellant argued that if the interpretation in the court *a quo* and *Kotzé* is accepted, it means that the status of agricultural land would remain "perpetually frozen"[80] from the time the transitional councils were established and not on the basis of whether the land was situated within the area of jurisdiction of the local government structures as listed in the definition of agricultural land in SALA. A narrow interpretation in this regard would simply have preserved the *status quo* pending the demarcation and establishment of the final new order of local government structures.[81] The Court agreed with this argument and further elaborated that the legislature contemplated the concept of agricultural land as fluid rather than static, and changing with the expansion of local authorities and the creation of new ones.[82] In this regard, the Court held that the proviso must be interpreted restrictively (as it is an exception to the general rule) and within the context of the legislative scheme which guided the restructuring process of local government which was to use existing statutory provisions (such as the proviso) until new ones could be enacted.[83]

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[76] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) para 16.
[77] Para 19.
[78] Para 19.
[79] Para 20.
[80] Para 21.
[81] Para 21.
[82] Para 22.
[83] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) paras 22 and 25.

Consequently, the Supreme Court of Appeal overturned the *Kotzé* decision and held that the amendment was intended to be temporary so as to only preserve the status of agricultural land. The proviso was meant to operate only for as long as the land situated there remained in the jurisdiction of the transitional council.[84] Accordingly, the amendment was intended to enable the proviso only for so long as the land in question remained in the jurisdiction of the transitional council.[85] However, once the transitional councils were replaced by municipal councils in 2000, the classified land lost its agricultural character unless the Minister specifically declared it to be agricultural land by notice in the *Government Gazette*.[86]

The Court criticised the approach of the court *a quo*'s in *Kotzé* because it failed to acknowledge the radically enhanced status and power of the new constitutional order accorded to local government.[87] The constitutional competences allow local government to administer and regulate land within their jurisdictions without executive oversight.[88] Furthermore, the Court pointed out that the Minister still has the power to exclude land for purposes of SALA in terms of the definition of SALA.[89] Accordingly, the Court found that the land was not agricultural land because it lost its historical character as agricultural land once it was brought within the NMMM and it therefore did not fall within the purview of SALA. Ministerial consent was thus found not to be a prerequisite for the validity of the contract of sale.[90]

2 2 3 Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd

Leave to appeal to the Constitutional Court was granted in the judgment of *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd.*[91] The Constitutional Court had to decide, on the same facts, whether the property sold at the time of the conclusion of the contract constituted "agricultural land" as envisaged by SALA.[92]

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[84] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) paras 22-25. See also Van Wyk (2009) *SA Public Law* 553.
[85] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) para 24.
[86] Section 1(a) of the Subdivision of Agricultural Land Act 70 of 1970 provides that the Minister may, after consultation with the relevant executive committee of the province concerned, declare land as agricultural and by way of notice in the *Government Gazette*. See also Van Wyk (2009) *SA Public Law* 553.
[87] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) para 26.
[88] Para 36.
[89] Para 27
[90] Paras 26-27.
[91] 2009 1 SA 337 (CC). See also Van Wyk (2009) *SA Public Law* 552-553.
[92] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) paras 2 and 57.

Essentially, the Court had to determine whether (a) the legislature had intended to do away with the power of the Minister to preserve agricultural land or; (b) the Act recognised the need for national control and policy decisions that affect the reduction or fragmentation of agricultural land and the need for a consistent national agricultural policy.[93]

In answering this question, the Court had to determine the intention of the legislature.[94] The court held that:

> "A cardinal rule in the construction of any legislation is that the intention of the legislature must be sought in the words employed in the legislation."[95]

However, in interpreting the plain meaning of the words, the Court found that a purely textual interpretation could result in findings that suited both the High Court and Supreme Court of Appeal judgments.[96] Subsequently, Kroon AJ made use of a further canon of statutory interpretation to determine the legislature's intention. The Constitutional Court held that the:

> "…ordinary meaning of the words in a statute must be determined in the context of the statute (including its purpose) read in its entirety."[97]

The Court subsequently followed a purposive reading of SALA. It was pointed out that the essential purpose of SALA has been regulatory by which "the legislature sought in the national interest to prevent the fragmentation of agricultural land into small uneconomic units".[98] The Court stated further that there was no compelling reason why this purpose would have remained current only during the life of the transitional councils.[99]

The Court also pointed out additional contextual indicators of the legislature's intention. Firstly, the transitional provisions in the Interim Constitution and the reference to transitional councils in the proviso did not refer to the restructuring of local government, but rather dealt with the rearrangement of powers between the national and provincial government relating to concurrent competences. In this regard, there was thus no indication that any part of the agricultural functional area was to be administered by a future local government,[100] nor was

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[93] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 53.
[94] Para 58.
[95] Para 58.
[96] Para 59.
[97] Para 61.
[98] Para 13.
[99] Paras 58-61.
[100] Paras 67 and 69.

there a suggestion that the functional area of agriculture was assigned to local government.[101] Secondly, in response to the Supreme Court of Appeal's view on the enhanced status of local government, the judge in the Constitutional Court contended that he was persuaded that:

> "…the enhanced status of municipalities and the fact that they have such powers is a ground for ascribing to the legislature the intention that national control over 'agricultural land' through the [Subdivision of] Agricultural Land Act, effectively be a thing of the past".[102]

The judge reasoned as follows:

> "[L]and, agriculture, food production and environmental considerations are obviously important policy issues on a national level. An interpretation of the [Subdivision of] Agricultural Land Act that would attribute to the legislature the intention to retain the national government's role in effectively formulating national policy on these and other related issues, and to recognise the need for national policy to play a role in decisions to reduce 'agricultural land' and for consistency in agricultural policy throughout the country, is an interpretation that can and should properly be adopted."[103]

Accordingly, the Court found that the life of the proviso was not tied to the life of the transitional councils. The reference in the proviso to land within the area of a transitional council was dictated by the factual position existing at the time which had to be addressed. That was done by the proviso pinpointing the stage from which land classified as agricultural land would retain that classification, regardless of the development in local government structures that followed. The enhanced status of present day municipalities and the fact that they have extended powers was not a ground for ascribing to the legislature the intention that national control over agricultural land through SALA was effectively a thing of the past.

Ultimately, the Court found that the effect of the amendment was that all land that was defined as agricultural land prior to the establishment of transitional councils remained classified as agricultural land.[104] Furthermore, ministerial consent is still a requirement

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[101] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 75.
[102] Para 80.
[103] Para 80.
[104] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 62. For a discussion of the majority judgment see Olivier & Williams (2010) *Journal for Juridical Sciences* 99-128.

before land may be subdivided, despite the fact that all land, including agricultural land, is now situated in the area of jurisdiction of a municipality.[105]

2 3 Conclusion

SALA continues to have important implications for redistribution, especially where private agricultural land is concerned.[106] This has both benefits and disadvantages. For example, Pienaar notes that the procedures that require consent of the Minister of Agriculture (now the Minister of Agriculture, Land Reform and Rural Development)[107] before subdivision of agricultural land can take place, are time-consuming and may result in uncertainty and delays that could impact negatively on redistribution projects, especially where time is of the essence.[108] On the other hand, however, the prohibition on the uneconomic subdivision of agricultural land is a legitimate consideration.[109] It is thus critical that the continued use of SALA as a regulatory mechanism within the context of new developments is explored further.[110]

Pertinently, the category of "agricultural land" still exists. However, it is still unclear what agricultural land is. Accordingly, it may be necessary to explore the concept of agricultural land as it is defined in specific Acts and in a specific case further.

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[105] Pienaar *Land Reform* 351; Van Wyk *Planning Law* 382.
[106] Pienaar *Land Reform* 351.
[107] On the 29th of May 2019, President Ramaphosa announced the appointment of a reconfigured national executive following the general elections <https://www.gov.za/speeches/president-cyril-ramaphosa-announces-reconfigured-departments-14-jun-2019-0000> (accessed 15-08-2019). The Minister of Agriculture, Land Reform and Rural Development is responsible for the newly reconstituted Department of Agriculture, Land Reform and Rural Development (DALRRD). This is a new department arising from a merger between the Department of Agriculture, Forestry and Fisheries (DAFF) and the Department of Rural Development and Land Reform (DRDLR).
[108] Pienaar *Land Reform* 352. See also MC Lyne & MAG Darroch "Land redistribution in South Africa: Past performance and future policy" (2003) 6-7 <https://www.researchgate.net/publication/237652958_Land_Redistribution_in_South_Africa_Past_Performance_and_Future_Policy> (accessed 27-09-2019).
[109] See Frantz *Repealing the Subdivision of Agricultural Land Act* 153-157 where he comes to the conclusion that the prohibition on the uneconomic subdivision of agricultural land is a legitimate reason, and to that end, the Act ought to continue as a legitimate land use regulatory mechanism.
[110] See Chapter 3, 3 2 4 below.

3 The Preservation and Development of Agricultural Land: Policy Framework and corresponding Bill

3 1 Introduction

On 13 March 2015, the Minister of Agriculture published a *Draft Preservation and Development of Agricultural Land Policy*[111] ("*Draft Preservation Policy*") and Preservation and Development of Agricultural Land Framework Bill[112] on the preservation and development of agricultural land. However, following stakeholder input, a revised Bill[113] was published on 2 September 2016. Subsequently, in February 2017[114] the Department of Agriculture, Forestry and Fisheries announced that the revised Bill would be reconsidered and redrafted and submitted to Parliament in 2019/2020.[115] Although under consideration to be redrafted, the revised Bill[116] remains relevant and thus forms the focus of this section because it may provide some insight into the concept of agricultural land in South Africa.[117] Both the draft policy and revised Bill seek to demarcate, protect and develop agricultural land for food security purposes.[118]

The Preservation and Development of Agricultural Land Bill[119] ("Preservation Bill") recognises that it is in the interest of everyone to have agricultural land protected, for the benefit of present and future generations.[120] In this regard, the aims of the Bill are, amongst other things, to promote the preservation and sustainable development of agricultural land and the provision of regulations pertaining to the subdivision and change of land use applications in relation to agricultural land; to identify protected agricultural areas; to put in place measures to promote long-term viable and resilient farming units; to provide for

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[111] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015).
[112] Preservation and Development of Agricultural Land Framework Bill in GN 210 *GG* 38545 of 13-03-2015.
[113] Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016.
[114] Minister of Agriculture, Forestry and Fisheries "Preservation and Development of Agricultural Land Bill to be redrafted" (7 February 2018) <https://legal.sabinet.co.za/articles/preservation-and-development-of-agricultural-land-bill-to-be-redrafted/> (accessed 09-04-2019).
[115] Minister of Agriculture, Forestry and Fisheries "Preservation and Development of Agricultural Land Bill in the pipeline" (29 March 2018) <https://legal.sabinet.co.za/articles/preservation-and-development-of-agricultural-land-bill-in-the-pipeline/> (accessed 09-04-2019).
[116] Preservation and Development of Agricultural Land Bill.
[117] The definitions of agricultural land in both versions of the bills (the Preservation and Development of Agricultural Land Framework Bill (draft) in GN 210 *GG* 38545 of 13-03-2015 and the Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016) are similar, and almost identical. Accordingly it is only necessary to discuss the definition in the 2016 version of the bill.
[118] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 8 (the policy) and section 3 of the Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016 (the revised bill) where the objectives of the bill are set out.
[119] Preservation and Development of Agricultural Land Bill.
[120] Preamble of the Preservation and Development of Agricultural Land Bill.

mitigating measures to counter-act the loss of agricultural land and to set up a National Agricultural Land Registry for all activities on agricultural land.[121] Accordingly, if promulgated, the Act will replace SALA and will provide a new definition for agricultural land as discussed under the following section.

3 2 The definition of agricultural land

The Preservation Bill proposes to update the definition of agricultural land, as it was defined in SALA. However, agricultural land is still defined as a "residual category".[122] In terms of this Bill agricultural land, as a residual category of land, constitutes any land, excluding (a) land in a proclaimed township; (b) land included in an application for declaration as a township before the commencement of the new Act, provided that the application is approved; (c) land which immediately before the commencement of this Act, was formally zoned for non-agricultural purposes by any sphere of government or any public entity; and (d) land which the Minister, after consultation with other relevant Ministers and provincial Members of the Executive Council ("MECs") concerned, excludes by notice in the *Government Gazette*.[123] In other words, agricultural land is described as a category of land which does not fall within the ambit of the (a)-(d) categories of land listed.

Furthermore, the *Draft Preservation Policy*,[124] contains a rather different definition of agricultural land to that provided for in the Preservation Bill.

The *Draft Preservation Policy* holds that agricultural land constitutes:

> "any land which is or may be used for the production of biomass that provides food, fodder, fibre, fuel, timber and other biotic material for human use, either directly or through animal husbandry including aquaculture and inland and coastal fisheries or any other agricultural purpose, excluding land which the Minister, after consultation with other relevant Ministers and MECs concerned, excludes by means of notice in the *Gazette*".[125]

[121] Preamble read with clause 3 of the Preservation and Development of Agricultural Land Bill.
[122] Clause 1 of the Preservation and Development of Agricultural Land Bill. Agricultural land is described as a residual category of land because it does not fall within the ambit of the (a)-(d) categories of land listed in Clause 1 of the Preservation and Development of Agricultural Land Bill.
[123] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[124] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) in GN 210 *GG* 38545 of 13-03-2015.
[125] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 5.

Furthermore, the *Draft Preservation Policy* also provides for a definition of "agricultural purposes", as follows:

> "purposes normally or otherwise reasonably associated with the use of land for agricultural activities, including the use of land for structures, buildings and dwelling units reasonably necessary for, or related to, the use of the land for agricultural activities".[126]

Accordingly, the *Draft Preservation Policy* defines agricultural land in relation to the purpose for which it is used, whereas the Preservation Bill defines agricultural land as a residual category of land.

Interestingly, while "agricultural land" is defined as a residual category of land in the Preservation Bill, the Bill also provides for "unique agricultural land" and distinguishes between "high potential cropping [or agricultural] land" and "medium potential agricultural land" with reference to the different "land capability classes" [127] as set out in the *Draft Preservation Policy*. In this regard, the *Draft Preservation Policy* not only provides for a definition of agricultural land, but also provides for sub-classification of agricultural land, including "unique agricultural land";[128] "high value agricultural land";[129] and "medium value agricultural land."[130] The sub-classification is determined with reference to the "land capability."[131] In this regard, the *Draft Preservation Policy* makes provision for eight land capability classes.[132]

How these definitions of agricultural land set out in the *Draft Preservation Policy* and the Preservation Bill respectively may be reconciled and how the application of these definitions could play out in relation to other legislative and policy frameworks, are therefore also critical for purposes of the study.

Although the definition of agricultural land in the *Draft Preservation Policy* and Preservation Bill differs substantially, the definitions may still be reconcilable. The Preservation Bill identifies geographical areas which constitute agricultural land within South Africa, by

[126] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 5.
[127] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[128] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 7.
[129] 5.
[130] 6.
[131] 5.
[132] 6.

excluding certain areas from its definition.[133] In this regard, the Preservation Bill, like SALA, outlines the parameters of agricultural land in South Africa. The *Draft Preservation Policy* describes specifically what these geographical areas of land as demarcated through the operation of the definition of agricultural land in the Preservation Bill are or may be used for.[134] In this regard, the definitions of agricultural land set out in the policy and Bill are reconcilable. The extent to which these definitions may operate in relation to other legislative and policy frameworks is explored below.[135]

If revised and promulgated, the Preservation Bill, read with the *Draft Preservation Policy*, may provide for a clear and overarching or national concept of agricultural land in South Africa, namely certain demarcated land used for agricultural purposes. This will most certainly impact the manner of regulation of such land in light of constitutional imperatives.

4 The Regulation of Agricultural Land Holdings Bill

4 1 Introduction

A different definition of agricultural land emerged in the *Agricultural Landholding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings*[136] ("*ALPF*") in July 2013. This is in succession of the 2011 *Green Paper on Land Reform*[137] ("*Green Paper*") that introduced a four tier tenure system, comprising: (a) State and public land: leasehold; (b) privately owned land: freehold, with limited extent; (c) land owned by foreigners: freehold, but precarious tenure, with obligations and conditions to comply with; and (d) communally owned land: communal tenure, with institutionalised use rights.[138] Essentially, the *Green Paper* identified and outlined four broad categories of land. A tenure system was allocated to each of the abovementioned categories of land. While the *Green Paper* did not create any new land categories,[139] it was the first time that reference

[133] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[134] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 5.
[135] See 4 below.
[136] Department of Rural Development and Land Reform *Agricultural Landholding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013).
[137] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011.
[138] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) 5-6; Pienaar *Land Reform* 244. Also see the background highlighted in the Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017 36. See further JM Pienaar "The mechanics of intervention and the green paper on land reform" (2014) 17 *Potchefstroom Electronic Law Journal* 641-675 and A Rudman "Re-defining national sovereignty: the key to avoid constitutional reform? Reflections on the 2011 Green Paper on Land Reform" (2012) 23 *Stellenbosch Law Review* 417-437.
[139] All the categories existed before the publication of the Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011).

was made to (a) “freehold, but with limited extent"[140] as a tenure system for private land,[141] and (b) the limitation on foreign property rights in an official policy document.[142]

The 2017 Regulation Bill, developed to give effect to the *ALPF*, impacts on all agricultural land.[143] To that end “agricultural land” is set out specifically in the Regulation Bill. [144]

4 2 The definition of agricultural land

It is crucial to establish the definition of “agricultural land” because the Bill’s implementation and ultimately, its impact, turns on the definition thereof. Therefore, the dissertation will aim to interpret and establish what constitutes agricultural land in general and for purposes of the implementation of this Bill specifically.

The Regulation Bill holds that agricultural land means all land,[145] other than (a) land in a proclaimed township or; (b) land that will be proclaimed as a township; (c) land which immediately prior to the commencement of the Act was formally zoned for non-agricultural purposes by any sphere of government or any public entity or; (d) which has been excluded from the provisions of this Act by the Minister; or (e) which has been determined as non-agricultural land use in accordance with the provisions of the Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”).[146]

Arguably, this definition of agricultural land is problematic for a number of reasons. For one, the definition presupposes that land is currently categorised and regulated only in formal land use schemes and/or in accordance with SPLUMA, whereas in reality, not all land fits into the scheme of the proposed definition.[147] Secondly, the current legislative framework that regulates land-use management has not yet been integrated or aligned with other relevant laws.[148] Lastly, the Bill is intended to apply only to “agricultural land”. However, land owned by mining entities for instance, which is neither determined by SPLUMA as “non-

[140] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) 5-6.
[141] Pienaar *Land Reform* 244.
[142] 244-246.
[143] Clause 3 of the Regulation of Agricultural Land Holdings Bill.
[144] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[145] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[146] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[147] B Mabasa & A Khumalo “Holding onto land: the Regulation of Agricultural Land Holdings Bill” (3 July 2017) <https://www.werksmans.com/legal-updates-and-opinions/holding-onto-land-the-regulation-of-agricultural-land-holdings-bill/> (accessed 09-04-2019).
[148] Mabasa & Khumalo “Holding onto land: the Regulation of Agricultural Land Holdings Bill” (3 July 2017) <https://www.werksmans.com/legal-updates-and-opinions/holding-onto-land-the-regulation-of-agricultural-land-holdings-bill/> (accessed 09-04-2019).

agricultural land" nor formally zoned as "non-agricultural land", would inadvertently, fall within the scope of the definition of "agricultural land".[149] Accordingly, a possible disconnect between statutes, policies and schemes may exist.

Furthermore, the Regulation Bill also provides for "public" and "private" agricultural land. "Public agricultural land"[150] is defined as agricultural land that vests in the national government,[151] public entity[152] or municipality.[153] While the Bill does not expressly provide a definition of private agricultural land, the Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill[154] describes it as land owned by South Africans and foreign persons.[155] Reference is furthermore made to private agricultural land in chapter 4 of the Bill with regard to disclosures in respect of (a) the present ownership of agricultural landholdings, including the race, gender and nationality of the owner, the use and size of the agricultural land holding and any real right registered against and licence allocated to the agricultural land holding; and (b) the acquisition of ownership of private agricultural land holdings after the commencement of the Bill.

Apart from the attempt to distinguish between public and private agricultural land, the Bill is unclear where communal land fits in or if and how it will be impacted. With respect to large tracts of land where the government is registered as the owner of communal land,[156] the

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[149] Mabasa & Khumalo "Holding onto land: the Regulation of Agricultural Land Holdings Bill" (3 July 2017) <https://www.werksmans.com/legal-updates-and-opinions/holding-onto-land-the-regulation-of-agricultural-land-holdings-bill/> (accessed 09-04-2019).

[150] Clause 1 of the Regulation of Agricultural Land Holdings Bill.

[151] As defined in section 239 of the Constitution of the Republic of South Africa, 1996.

[152] As defined in section 1 of the Public Finance Management Act 1 of 1999.

[153] As defined in section 1 of the Local Government: Municipal Structures Act 32 of 2000.

[154] GN 229 *GG* 40697 of 17-03-2017.

[155] Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill 37.

[156] See Klopper & Pienaar (2014) *PELJ* 683-685 where the authors explain that: "The Native Trust and Land Act 18 of 1936 abolished individual land ownership by black people, [including those living in the former homelands (Bantustans)] and introduced trust tenure through the creation of the South African Development Trust, which was a government body responsible for purchasing land in "released areas" for black settlement…vested in the Trust was land reserved for the occupation of natives and land within the scheduled native areas as identified in the Natives Land Act". Accordingly, State (or public agricultural land) includes land previously held under the former homeland government and/or held in trust under the South African Development Trust, or the Ingonyama Trust in terms of the Ingonyama Trust Act 3 KZ of 1994 which is now under the control of the Department of Rural Development and Land Reform. Accordingly, the land is still owned (held in a trust) by the State. However, the land may be effectively presided over by a traditional authority or civic body, namely traditional councils or Communal Property Associations ("CPAs"). See in general JM Pienaar "Customary law and communal property in South Africa: Challenges and Opportunities" in T Xu & A Clarke (eds) *Legal strategies for the development and protection of communal property* (2018) 127-155. Despite the Department of Rural Development and Land Reform, *National Land Audit* (2013), it is also unclear how much land is owned by the State. See in this regard, P de Wet "Up to 21% of land is state owned, says surveyor general" in *Mail & Guardian* (05-09-2013) <https://mg.co.za/article/2013-09-05-up-to-21-of-land-is-state-owned-says-surveyor-general> (accessed 28-05-2017); C Walker & A Dubb "Fact Check 1: The Distribution of Land in South Africa: An Overview" *PLAAS* <http://www.plaas.org.za/plaas-publication/FC01> (accessed 28-05-2017) and Y Groenewald "Who owns the land?" in *City Press* (03-05-

land is used by communities.[157] However, the definition of public agricultural land in the Bill does not specifically include communal land. This raises two questions in particular, namely (a) whether all communal agricultural land is excluded from the scope of the Bill; and (b) what the potentially far-reaching implications thereof will be for the regulation of communal agricultural land if the Bill is applicable.[158]

2015) <http://city-press.news24.com/News/Who-owns-the-land-Ownership-by-numbers-20150503> (accessed 28-05-2017). However, see the purpose of the Land Commission at Chapter 3, 3 3 3 1 2 below.

[157] See Pienaar *Land Reform* 464; B Cousins "More than socially embedded: The distinctive character of communal tenure regimes in South Africa and its implications for land policy" (2007) 7 *Journal of Agrarian Change* 281-315 285-287; C Walker ""Redistributive land reform: for what and for whom?" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 132 138-140 and E Johnson *Communal land and tenure security: analysis of the South African Communal Land Rights Act 11 of 2004* LLM thesis, Stellenbosch University (2009) 5 in this regard. Thus far, the South African government has failed to comply with the Constitution's instruction to enact legislation required by sections 25(6) read with 25(9) for the millions of South Africans living on communal land. While there are laws that promote tenure security for farm dwellers and labour tenants, for instance the Extension of Security of Tenure Act 62 of 1997.
Land Reform (Labour Tenants) Act 3 of 1996, there is seemingly no legislation beyond the Interim Protection of Informal Land Rights Act 31 of 1996 ("IPILRA"), introduced in 1996, to secure land rights of the people living in communal land areas. The Communal Land Rights Act 11 of 2004 ("CLARA") empowered the Minister of Land Affairs (now the Minister of Agriculture, Land Reform and Rural Development) to transfer ownership of communal land from the State to communities residing there, to be held under "new order rights", the content of which was not defined. CLARA required that a community had to register its rules before it could be recognised as a juristic person, legally capable of owning land. The importance of CLARA was also underlined by the Constitutional Court in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 6 SA 32 (CC) para 30. See in this regard, JM Pienaar "The Battle of the Bakgatla-Ba-Kgafela Community: Access to and Control of Communal Land" (2017) 20 *Potchefstroom Electronic Law Journal* 1-23. However, after concerted opposition from rural people living in communal land areas, the Constitutional Court in *Tongoane v Minister for Agricultural Land Affairs* 2010 6 SA 214 (CC) declared CLARA invalid on procedural grounds in its entirety in 2010. See Pienaar "Customary law and communal property in South Africa: Challenges and Opportunities" in *Legal strategies for the development and protection of communal property* 138, 144-146 which provides that: "Following the unconstitutionality finding of CLARA…[IPILRA] is the only statutory measure that protects unregistered, informal land rights that are exercised by communities and individuals." While the IPILRA provides for the protection of land rights of the people living in communal areas, it does not regulate who owns the communal land. Accordingly, most communal land was, and still is, held in trust by the State for the benefit of those who occupy and use it. See Report of the High Level Panel on the Assessment of key legislation and the acceleration of fundamental change (November 2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf> (accessed 07-09-2019) 258-264 and Pienaar "Customary law and communal property in South Africa: Challenges and Opportunities" in *Legal strategies for the development and protection of communal property* 138, 144-146 in this regard. Importantly, see recent developments, in particular the publication of the Communal Land Tenure Bill [B-2017] in GN 510 *GG* 40965 of 07-07-2017 which aims to regulate communal land.

[158] In this regard, it is unclear if and how the Regulation Bill and the Department of Rural Development and Land Reform, *Communal Land Tenure Policy* (23-24 August 2013) ("CLTP") would function together. Accordingly, the implications of the CLTP should be considered. The CLTP seeks to reform communal tenure to ensure security of land rights and production relations for people residing in communal areas. To achieve this, the policy envisions institutionalised use rights, which shall be administered either by traditional councils in areas that observe customary law, CPAs or trusts outside of these areas. This is also illustrated by the "wagon wheel" diagramme in the CLTP: The first wagon wheel envisaged by the CLTP, proposes to transfer the "inner boundaries" of communal land that observe customary laws to traditional councils. Once a traditional council is in possession of the title, ownership will vest exclusively in the traditional council (a product of the Traditional Leadership and Governance Act 41 of 2003) – thereby preventing others from making decisions about the land. While traditional councils will get title deeds of these communal areas, the individuals and families will get "institutionalised use rights" to parts of the land within them. In this regard, the new policy is similar to the provisions of CLARA, which proposed that traditional councils should have ownership of, and

Despite two land audit reports released in November 2017 by the Land Centre of Excellence[159] and the South African government[160] respectively, there is still no reliable data on land ownership in South Africa.[161] Accordingly, although the Regulation Bill distinguishes between private and public agricultural land, the State does not have reliable information on how much agricultural land it owns and has available for redistribution.

The absence of reliable information on who owns "agricultural land" in South Africa has therefore influenced one of the express objectives of the Regulation Bill: To obtain accurate information about owners of agricultural land (or farmland), which will enable the State to have a better understanding of land ownership patterns in South Africa.[162] Accordingly, in its current format, the Regulation Bill envisages the establishment of a register detailing public and private agricultural land. The Bill requires that every owner of agricultural land

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power over, communal land. In theory, the second wagon wheel provides for CPAs or trusts to own land titles. However, the new CLTP states that no new CPAs will be established in areas where traditional councils already exist – that is, most of the former Bantustans. In other words, the CLTP reserves communal land for control by the traditional councils while CPAs and other structures are expected to operate only outside of traditional communal areas. See Department of Rural Development and Land Reform, *Communal Land Tenure Policy* (23-24 August 2013) 13, 17-20, 22 in this regard. If the communal areas are owned by a traditional council or CPA, it is unclear whether it would form part of public agricultural land as determined by the Regulation Bill and consequently whether the communal land will be subject to the regulation in terms of the Bill. Furthermore it is unclear if or how the Regulation Bill may impact the tenure security of the people living in communal areas. To fully understand the CLTP, one must read it together with the Department of Rural Development and Land Reform, *Rural Development Framework Policy* (24 July 2013) and the Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013). Importantly, see Pienaar "Customary law and communal property in South Africa: Challenges and Opportunities" in *Legal strategies for the development and protection of communal property* 142-149 where Pienaar explores the relationship between the Traditional Courts Bill GN 901 *GG* 34850 12-12-2011 and the CLTP. For one, the envisioned outcomes of the CLTP shall advance key outcomes envisaged by the RDF, which include amongst others, decongestion of communal spaces; gender equity in land governance structures and tenure rights and household food and nutrition security. Furthermore, and in particular, the *State Land Lease and Disposal Policy* applies to most of the same land as the CLTP. See Pienaar *Land Reform* 255-258.

[159] Land Centre of Excellence, *Land Audit: A transactions approach* (November 2017) <https://cisp.cachefly.net/assets/articles/attachments/71719_agrisa_land-audit_november-2017.pdf> (accessed 09-07-2019).

[160] Department of Rural Development and Land Reform, *Land Audit Report: Phase 2 Private land ownership by race, gender and nationality* (November 2017) <file:///C:/Users/Tina%20Kotz%C3%A9/Downloads/land_audit_report13feb2018%20(2).pdf> (accessed 09-07-2019).

[161] G Nicolson "Who owns SA land? AgriSA tries and fails to provide a clear answer" (1 November 2017) *Daily Maverick* <https://www.dailymaverick.co.za/article/2017-11-01-who-owns-sa-land-agrisa-tries-and-fails-to-provide-a-clear-answer/> (accessed 09-07-2019); Land Accountability and Research Centre "Who owns the land? Half an answer from AgriSA land audit" (8 November 2017) available at: <https://www.customcontested.co.za/who-owns-the-land-half-an-answer-from-agrissa-land-audit/> (accessed 09-07-2019); CD van Rensburg "Land Audit's bizarre recommendations" (1 February 2018) *CityPress* <https://www.fin24.com/Economy/land-audits-bizarrerecommendations-20180211> (accessed 09-07-2019); T Corrigan "Land audit figures inaccurate" (4 September 2018) available at: <https://www.iol.co.za/pretoria-news/land-audit-figures-inaccurate-16879759> (accessed 09-07-2019); South African Institute of Race Relations "Who owns the land: A critique of the State land audit" (26 March 2018) <https://irr.org.za/reports/occasional-reports/files/who-owns-the-land-26-03-2018.pdf> (accessed 09-07-2019).

[162] Clause 2(e) of the Regulation of Agricultural Land Holdings Bill.

disclose information pertaining to ownership of the land, including race and gender.[163] This information will then be recorded in a national register. To that end, the Bill envisages the establishment of a new administrative body, the Office of the Land Commission ("Land Commission"), tasked with the administration of the agricultural land holdings register.[164] However, before the land is accounted for by the Land Commission it is difficult to envision how the Bill once promulgated will function or be able to impose land ceilings. Presumably, preparation of the register of agricultural land is only the first step in the forced land redistribution process which is clearly the primary objective of the Regulation Bill.[165] Once all information regarding the ownership of agricultural land is gathered, the next step will be the determination of which land falls into the definition of "redistribution agricultural land". This step is explored further in Chapter 3 below.

5 Reflection

5 1 Introduction

Having regard to (a) the preambles and/or objectives; (b) the definition of agricultural land; and (c) the application of SALA, the Preservation Bill and the Regulation Bill, the synergy between SALA and the Regulation Bill and the Preservation Bill and Regulation Bill is discussed respectively.

5 2 The synergy between SALA and the Regulation Bill

If it is assumed that the Preservation Bill will not be promulgated,[166] SALA will continue to remain operational. If it is assumed that the Regulation Bill will be promulgated, then the coherency between SALA and the Regulation Bill needs to be explored.

5 2 1 The preambles and objectives of SALA and the Regulation Bill

The preamble of SALA briefly highlights its objective: To control the subdivision and, in connection therewith, the use of agricultural land. As mentioned above, SALA aims to protect agriculture as an economic activity by prohibiting the subdivision of prime agricultural land without the Minister's consent.[167] In contrast to this, the main aim of the Regulation Bill

[163] Clause 15 of the Regulation of Agricultural Land Holdings Bill.
[164] Clauses 4, 8 and 12 of the Regulation of Agricultural Land Holdings Bill.
[165] Clause 2 of the Regulation of Agricultural Land Holdings Bill.
[166] The Preservation Bill and corresponding policy was first introduced on 13 March 2015. However, following stakeholder input, a revised Preservation Bill was published on 2 September 2016. Subsequently, in February 2017 the Department of Agriculture, Forestry and Fisheries announced that the revised Preservation Bill will be reconsidered and redrafted and submitted to Parliament in 2019/2020.
[167] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970.

is to redress ownership patterns by obtaining and redistributing agricultural land.[168] As mentioned, one way of obtaining agricultural land for redistribution is by way of imposing land ceilings.[169] The imposition of land ceilings may inherently subdivide prime agricultural land into small uneconomic parcels. Accordingly, the imposition of land ceilings may conflict with the prohibition to subdivide land. Therefore, the imposition of the respective regulatory mechanisms in SALA and the Regulation Bill clash and may be irreconcilable. In this regard, the aims of SALA and the Regulation Bill, are opposed and may be difficult to reconcile in practice.

5 2 2 The definition of agricultural land in SALA and the Regulation Bill

While both SALA and the Regulation Bill define agricultural land as a residual category, the definitions differ substantially. Both bills exclude land in a township[170] and land which the respective Ministers[171] (now the Minister of Agriculture, Land Reform and Rural Development) may exclude from the respective Act or Bill.[172] Apart from these two similar categories of land excluded from the definition of agricultural land, the other categories listed in SALA and the Regulation Bill differ.

For one, while SALA excludes land of which the State is the owner or land which is held in trust by the State or any Minister for any person,[173] the Regulation Bill specifically does not exclude “public agricultural land” from the definition of agricultural land. By omission, this could mean that communal land is also part and parcel of the concept of agricultural land and will thus be impacted and/or regulated by the Regulation Bill. Accordingly, the provisions and regulatory mechanisms in SALA do not apply to State land which means that State land can be subdivided without the consent of the Minister. However, State land or public agricultural land as defined by the Regulation Bill, is not excluded from the definition of agricultural land. All agricultural land that vests in all levels of government, including public entities, will be subject to the imposition of regulatory mechanisms such as land ceilings in terms of the Regulation Bill. Where State land (or public agricultural land) is concerned the imposition of land ceilings in terms of the Regulation Bill will not conflict with the prohibition

[168] Clause 2 of the Regulation of Agricultural Land Holdings Bill.
[169] Clause 25 of the Regulation of Agricultural Land Holdings Bill.
[170] Section 1(b) of the Subdivision of Agricultural Land Act 70 of 1970 and Clause 1(a) of the Regulation of Agricultural Land Holdings Bill.
[171] Previously, the Minister of Agriculture, Forestry and Fisheries and the Minister of Rural Development and Land Reform.
[172] Section 1(f) of the Subdivision of the Agricultural Land Act 70 of 1970 and the Clause 1(d) of the Regulation of Agricultural Land Holdings Bill.
[173] This includes communal land held in trust by the State.

to subdivide agricultural land. In this regard, the respective mechanisms in SALA and the Regulation Bill, where State land is specifically concerned, may be compatible and capable of operating together in practice. However, where private agricultural land is concerned it is still unclear how the provisions of SALA and the Regulation Bill will operate in practice.

In terms of both SALA and the Regulation Bill agricultural land is defined as a residual category. However, the exclusions listed in each legislative measure differ substantially. Accordingly, no clear, single definition of agricultural land emerges when comparing SALA and the Regulation Bill.

5 2 3 The application of SALA and the Regulation Bill

Clause 3 of the Regulation Bill posits that it is the prime legislation in respect of all agricultural land. According to this clause, key legislation pertaining to the acquisition and disposal of agricultural land, such as SALA (which preserves agricultural land in the national interest) will be trumped by the provisions of the Regulation Bill where a conflict between the Bill and any other Act exists. If SALA and the prohibition against subdivision can be easily superseded by the provisions of the Regulation Bill, regarding the acquisition and disposal of agricultural land, then the Bill's operation may hold negative implications for long-term food security. The interplay between these two legislative measures is further explored in Chapter 3.

5 3 The synergy between the Preservation Bill and the Regulation Bill

If it is assumed that the Preservation Bill will come into operation, then it will replace SALA and it will provide for a new definition of agricultural land. If it is assumed that the Preservation Bill is promulgated, then its interplay with the Regulation Bill has to be considered.

5 3 1 The preambles and objectives of the Preservation and Regulation Bills

From the outset, both bills aim to provide for a register of agricultural land.[174] However, the registers will seemingly capture different information, in line with the different objectives of the two bills. In this regard, the Preservation Bill provides for the National Agricultural Land Register, which will capture information regarding the preservation, sustainable use and

[174] See preambles of the Preservation and Development of Agricultural Land Bill and the Regulation of Agricultural Land Holdings Bill.

management of the natural agricultural resources.[175] In contrast, the Regulation Bill provides for a register of agricultural land, which will capture data regarding the ownership of public and private agricultural land in South Africa.[176]

With regard to its objectives, it appears that at least some of the objectives of the two respective bills overlap. For example, one of the objectives of the Regulation Bill is to promote food security and enable the State to effectively deliberate on matters of land and natural resource economics,[177] whereas the Preservation Bill aims to promote the preservation and sustainable development of agricultural land and establish an appropriate framework that facilitates concurrent land uses on agricultural land, without jeopardising long-term food security.[178]

However, apart from this overlap the preamble and objectives of the two respective bills differ drastically. The Regulation Bill's main aim is to redress ownership patterns by obtaining and redistributing agricultural land,[179] whereas the Preservation Bill's main purpose is to promote the preservation and sustainable development of agricultural land and to ensure the sustainable use and development thereof.[180]

To achieve these aims, both bills envisage to use different mechanisms. On the one hand, the Regulation Bill aims to use land ceilings and restrictions on the acquisition and disposal of agricultural land to ensure its main purpose, whereas the Preservation Bill on the other hand, aims to use restrictions on the subdivision of agricultural land to preserve agricultural land and to introduce measures to discourage land use changes from agriculture to other forms of development. These measures,[181] when implemented simultaneously in terms of these respective bills, may clash. Accordingly, it will be important to establish when which Bill applies. In this regard, it is important to consider if or how the definitions of agricultural land in the Preservation and Regulation Bills could function together.

[175] Clause 46(1)(a) of the Preservation and Development of Agricultural Land Bill.
[176] Clause 12 read with clauses 15 and 17 of the Regulation of Agricultural Land Holdings Bill.
[177] Clauses 2(c) and (f) of the Regulation of Agricultural Land Holdings Bill.
[178] Clauses 3(a) and (h) of the Preservation and Development of Agricultural Land Bill.
[179] Clause 2 of the Regulation of Agricultural Land Holdings Bill.
[180] Clause 3 of the Preservation and Development of Agricultural Land Bill.
[181] See Chapter 3 in this regard.

5 3 2 The definition of agricultural land in Preservation and Regulation Bills

It seems the definitions of agricultural land envisaged in the Regulation Bill[182] and the Preservation Bill[183] are almost identical. Both bills describe agricultural land as residual categories, by providing a list of what it is not. Furthermore, both bills exclude: (a) land in a proclaimed township;[184] (b) land which immediately before the commencement of this Act, was formally zoned for non-agricultural purposes by any sphere of government or any public entity;[185] (c) land which may be proclaimed as a township in future;[186] and (d) land which the Minister may exclude from the definition of agricultural land.[187]

Apart from these four categories listed in both bills, the Regulation Bill lists a fifth category of land that does not constitute agricultural land, namely land zoned as non-agricultural land in terms of SPLUMA.[188] Notwithstanding this fifth category, the definitions are seemingly coherent and capable of functioning together.

Furthermore, neither the Preservation Bill nor the Regulation Bill includes land situated within the jurisdiction of a municipality or land of which the State is the owner or held in trust by the State, as SALA does. Arguably, this could mean that communal land is also part of the concept of agricultural land and will thus be regulated by the respective bills.

While these definitions may differ slightly within each context, there is still a need for the definitions to provide clarity in respect of which land specifically will be affected and *when* which bill will be applicable. Both bills demarcate the geographical areas which constitute agricultural land within South Africa. However, it is important to establish whether the bills, with different purposes, may function concurrently or whether the Preservation Bill trumps the operation of the Regulation Bill or *vice versa*.

[182] Regulation of Agricultural Land Holdings Bill.
[183] Preservation and Development of Agricultural Land Bill.
[184] Clause 1(a) of the Regulation of Agricultural Land Holdings Bill and clause 1(a) of the Preservation and Development of Agricultural Land Bill.
[185] Clause 1(c) of the Regulation of Agricultural Land Holdings Bill and clause 1(c) of the Preservation and Development of Agricultural Land Bill.
[186] Clause 1(b) of the Regulation of Agricultural Land Holdings Bill and clause 1(b) of the Preservation and Development of Agricultural Land Bill.
[187] Clause 1(d) of the Regulation of Agricultural Land Holdings Bill and clause 1(d) of the Preservation and Development of Agricultural Land Bill.
[188] Clause 1(e) of the Regulation of Agricultural Land Holdings Bill.

5 3 3 The application of the Preservation and Regulation Bills

Both bills, when enacted, will constitute national legislative frameworks regulating agricultural land. Clause 3 of the Regulation Bill posits that it is the prime legislation in respect of all agricultural land. According to this clause, key legislation pertaining to the acquisition and disposal of agricultural land, such as the Preservation Bill (which preserves agricultural land in the national interest) will be trumped by the Regulation Bill. This may create a legislative lacuna which has negative implications for long-term food security.[189]

However, there are a number of interpretative tools to determine whether the bills may function concurrently in relation to agricultural land or whether one will trump the other. Both bills provide for potential future conflicts with other legislation. The following provisions serve as the starting point when dealing with these potential conflicts:

The Preservation Bill provides that:

> "In the event of any conflict between a section of this Act and (a) other national legislation, the section of this Act prevails if the conflict specifically concerns the management or development of agricultural land".[190]

Accordingly, only where there is a conflict between the Preservation and Regulation Bill regarding the "management or development of agricultural land", will the Preservation Bill trump the Regulation Bill. However, there is no indication what the "management and development of agricultural land" in the Preservation Bill entails. It is postulated that the "management and development of agricultural land" is a very broad concept which may, in light of the aims of the Preservation Bill, denote the control or use of land in such a way that it increases the agricultural productivity, given the land capability, which in turn increases agricultural output and income (profit) from the land and ensures food security.[191] In this regard, chapter 2 of the Preservation Bill also provides for principles, norms and standards for agricultural land management and land classification systems. Protecting agricultural land; ensuring the sustainable use of agricultural land; facilitating diversity; providing

[189] See Department of Social Development and the Department of Agriculture, Forestry and Fisheries *The National Policy on Food and Nutrition Security* (August 2013), published in *GG* 37915 of 22-08-2014; Department of Agriculture *The Integrated Food Security Strategy for South Africa* (17 July 2002).
[190] Clause 4(1)(a) of the Preservation and Development of Agricultural Land Bill.
[191] Clause 3 of the Preservation and Development of Agricultural Land Bill read with BN Basu, R Roy & P Nikhil *Impact of Agricultural Development on Demographic Behaviour* (1979) 15.

assistance to increase agricultural productivity and controlling pests may thus all fall within the purview of "agricultural development".

Furthermore, the Regulation Bill provides that:

> "In the event of a conflict between the provisions of this Act and any other law relating to the acquisition and disposal of agricultural land, the provisions of this Act prevail."[192]

Only where there is a conflict between the Preservation and Regulation Bill relating to the acquisition and/or disposal of agricultural land, will the Regulation Bill trump the former. However, the "acquisition and disposal of agricultural land" is a broad concept which means that the Regulation Bill may trump the Preservation Bill in most cases where there is a conflict between the two Bills. In this regard, the bills may be read together and function concurrently, although the interrelationship between the two bills may be very complex. The interplay between these two bills is further explored in Chapter 3.

6 Conclusion

As stated, there is no single definition of agricultural land. Various pieces of legislation, bills and policies, with varied objectives, provide for seemingly different definitions of what agricultural land entails. While these definitions may differ within each context, there is still the need for the definitions to provide clarity in respect of which land specifically will be affected and knowing which legislative measure will apply and in which circumstances.

All of the legislative measures (legislation and bills) discussed above define agricultural land as a residual category. When SALA and the Regulation Bill are compared it is clear that there is no uniform or single definition of what constitutes agricultural land. However, when the definitions of agricultural land as defined in the Preservation and Regulation Bill are compared, it is clear that the definitions are seemingly similar and almost identical and capable of providing a clear and uniform definition of what constitutes agricultural land in South Africa.

Accordingly, if it is assumed that the Preservation Bill, read with the *Draft Preservation Policy*, will commence and replace SALA, then the definition of agricultural land for purposes of this dissertation may constitute: Any private or public land in South Africa used for

[192] Clause 3(3) of the Regulation of Agricultural Land Holdings Bill.

agricultural purposes, except (a) land in a township; (b) land zoned for non-agricultural purposes in terms of any legislation; and (c) land excluded by the Minister by notice in the *Government Gazette*.

Having established what may constitute agricultural land for purposes of the dissertation, it is unclear how the different regulatory mechanisms, specifically subdivision regulations and land ceilings, may operate together, if applied to the same piece of agricultural land. Accordingly, the different regulatory measures and how they may operate together in practice are explored further in Chapter 3.

Chapter 3: Mechanisms for the regulation of agricultural land in South Africa

1 Introduction

Ownership is subject to various regulatory provisions or measures, some of which may severely affect the ownership entitlements of the property owner.[1] In this context, the question is not whether a government has the power to regulate the use of property but rather to what extent the State can regulate vested rights and the corresponding implications of such regulation.[2] The State's ability to impose regulatory mechanisms on property holders is a legitimate constitutional activity, provided that the regulation complies with the Constitution.[3] The State, as part of its inherent police power,[4] must be able to regulate property to promote and protect the public interest.[5] The public interest includes the nation's commitment to land reform,[6] and to reforms to bring about equitable access to natural resources such as agricultural land.[7] Pertinently, section 25(5) of the Constitution provides that the State must regulate property by means of reasonable legislative and other measures to foster conditions which enable South African *citizens* to gain access to (agricultural) land on an equitable basis. In other words, to establish a more equitable distribution of land,[8] the main purpose of redistribution is to provide land and access to land (including rights to use land) in an equitable manner to previously disadvantaged Black people who have no land or insufficient land.[9] Furthermore, section 25(8) of the Constitution provides that no provision

[1] AJ van der Walt *Constitutional Property Law* 3 ed (2011) 91. While the Constitution of the Republic of South Africa, 1996 has brought a new dimension to the regulation of private property rights, it is acknowledged that ownership has always been subect to regulation (limitation). See AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016) 93; H Mostert & A Pope (eds) *The Principles of The Law of Property* (2010) 116-157; CG van der Merwe *Sakereg* 2 ed (1989) 176-178 and PJ Badenhorst, JM Pienaar & H Mostert *The Law of Property* 5 ed (2006) 95. See 2 below.

[2] E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD, Stellenbosch University (2015) 128. See also JB Baron "The contested commitments of property" (201) 61 *Hastings Law Journal* 917-967, 942 where the author explains that within the space demarcated by the limits of constitutional protection, the State is free to exercise its regulatory powers legitimately, even if it appears that it infringes individual freedom.

[3] See Chapter 4 below.

[4] The State's power in relation to property has three dimensions, namely the police power, the power of eminent domain and the taxing power. See further J Murphy "Property rights in the new constitution: An analytical framework for constitutional review" (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 623-644 630.

[5] Van der Sijde *Reconsidering the relationship between property and regulation* 23; Murphy (1993) *THRHR* 630; Van der Walt *Constitutional Property Law* 3 17, 214, 218, 251; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 33. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 521.

[6] Section 25(4) of the Constitution of the Republic of South Africa, 1996.

[7] Section 25(8) of the Constitution of the Republic of South Africa, 1996.

[8] Van der Walt & Pienaar *Introduction to the Law of Property* 368.

[9] 365.

under section 25 in general may impede the State from taking legislative and other measures to achieve land and other reforms[10] with the aim of redressing the results of past discriminatory measures and practices.[11]

Depending on the underlying aim or the reason for regulation,[12] there are numerous regulatory mechanisms that impact an owner's entitlements in relation to immovable property, specifically rural[13] and urban land.[14] However, the focus, for purposes of this dissertation, falls on statutory measures in relation to rural immovable property, in particular agricultural land. Moreover, the focus is on regulatory measures or provisions that may impact an owner's entitlements in relation to agricultural land and which may contribute to making agricultural land available for redistribution purposes.[15]

Chapter 3 provides for an exposition of existing and newly proposed regulatory mechanisms in relation to agricultural land in South Africa in view of the land reform programme, specifically the redistribution programme.[16] Accordingly, "regulatory mechanism" for purposes of this study includes mechanisms that provide for, regulate the use of, promote and impacts, agricultural land. While there may be other mechanisms regulating or impacting agricultural land in general, and within the context of redistribution, the particular mechanisms explored for purposes of this dissertation include (a) provisions relating to the subdivision of agricultural land and (b) land ceilings. With respect to foreign land owners a further mechanism is employed, namely (c) restrictions on the acquisition and disposal of agricultural land. These regulatory mechanisms not only impact an owner's entitlements in

[10] Such as natural resources, including new mineral and water dispensations.
[11] Section 25(8) of the Constitution of the Republic of South Africa, 1996. See also the history of dispossession in South Africa set out in *Daniels v Scribante* 2017 4 SA 341 (CC) paras 14-21.
[12] For example, redistribution, tenure security, restitution, land use planning; township establishment, spatial planning and land management, and environmental, conservation and heritage considerations.
[13] Generally, land tax and the Spatial Planning and Land Use Management Act 16 of 2013 and Expropriation Act 63 of 1975 may impact all land. Legislation that may impact rural land and ownership entitlements include: the Land Reform (Labour Tenants) Act 3 of 1996; the Extension of Security of Tenure Act 62 of 1997; the Restitution of Land Rights Act 22 of 1994; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Land Reform: Provision of Land and Assistance Act 126 of 1993; the Subdivision of Agricultural Land Act 70 of 1970; the Environmental Conservation Act 73 of 1989; the National Environmental Management Act 107 of 1998; the National Environmental Management Act: Protected Areas 57 of 2003; Conservation of Agricultural Resources Act 43 of 1983; the Agricultural Pests Act 36 of 1983; the National Veld and Forest Fire Act 101 of 1998; and the Fencing Act 31 of 1963.
[14] The Spatial Planning and Land Use Management Act 16 of 2013 and Expropriation Act 63 of 1975 may impact all land. Other Acts that specifically impact urban land include: the National Building Regulations and Building Standards Act 103 of 1977; the Housing Act 107 of 1997; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Environment Conservation Act 73 of 1989; and the National Environmental Management: Air Quality Act 39 of 2004.
[15] Van der Walt & Pienaar *Introduction to the Law of Property* 365.
[16] Excluding land tax or property tax measures and mechanisms such as the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997 which regulate and may impact an landowner's entitlements and may open up land for redistribution purposes.

relation to agricultural land, but may also make more agricultural land available for redistribution purposes. While this Chapter provides for an exposition of the regulatory mechanisms in South Africa alluded to above, subsequent chapters will provide for an investigation into the constitutionality[17] and efficacy[18] of each of these mechanisms.

2 The regulation of immovable property in South Africa in light of land reform considerations

There are various statutory mechanisms available for the regulation of agricultural land in South Africa, impacting an owner's entitlements. In this regard, the concept of ownership becomes important. There are different ways to define or describe the concept of ownership.[19] The concept of ownership may also change as the needs of society develop.[20] In South Africa the concept of ownership, as understood in terms of traditional common-law, during the pre-constitutional era, has to adapt in line with the provisions of the Constitution in the constitutional era.

Traditionally, according to Roman-Dutch Law, ownership was often conceptualised in absolutist and encompassing terms.[21] Ownership has been described, *inter alia*, by way of the ownership entitlements linked thereto, or to which an owner is entitled to, and by way of the relationship between the person and the property in question.[22] For example, Van der Merwe describes the notion of ownership as the "most comprehensive right embracing not only the power to use (*ius utendi*), to enjoy the fruits (*ius frutendi*) and to consume the thing (*ius abutendi),* but also the power to possess (*ius possidendi*), to dispose of (*ius disponendi*), to reclaim the thing from anyone who wrongfully withholds it or to resist any unlawful invasion

[17] See Chapter 4 in general.
[18] See Chapter 6, 3 below.
[19] Mostert & Pope *The Principles of the Law of Property* 91; Van der Walt & Pienaar *Introduction to the Law of Property* 45-46; CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *The Law of South Africa* 2 ed (RS 31-01-2014) paras 9, 59-69.
[20] Mostert & Pope (eds) *The Principles of the Law of Property* 91; Van der Walt & Pienaar *Introduction to the Law of Property* 45-46; Van der Merwe "Things" in *LAWSA* paras 9, 59-69.
[21] AJ van der Walt & P Dhliwayo "The notion of absolute ownership and exclusive ownership: A doctrinal analysis" (2017) 134 *South African Law Journal* 34-52 in general. See further H Scott "Absolute ownership and legal pluralism in Roman law: Two arguments" (2011) *Acta Juridica* 23-34, 23; P Birks "The Roman law concept of dominium and the idea of absolute ownership" (1985) *Acta Juridica* 1-37, 1; D Visser "The absoluteness of ownership: The South African common law in perspective" (1985) *Acta Juridica* 39-52, 39.
[22] Van der Walt & Pienaar *Introduction to the Law of Property* 47-48.

of the thing (*ius negandi*)".[23] Ownership has also been described as the "most extensive" legal relationship that can exist between a person and property.[24]

The common law conception of ownership, generally accepted in South Africa in the pre-constitutional era, is found in *Gien v Gien*,[25] where Spoelstra AJ held that:

> "The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property, as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law".[26]

The phrase *plena in re potestas* confirms the notion that the owner may act at will with the property within the limits of the law.[27] This description of ownership as the most complete right does not suggest that ownership is absolute or that no limitations may be placed on it.[28] In other words, it is accepted that ownership has always been subjected to limitations.[29] Different restrictions may be placed on the owner's right to ownership and the entitlements flowing from it, namely statutory measures; limited real rights of third parties against the property in question; personal rights such as creditor's rights of third parties against the owner; and neighbour law restrictions.[30] Accordingly, the concept of ownership can be

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[23] Van der Merwe "Things" in *LAWSA* paras 9, 59-69 in general. However, the content of ownership must be determined within the context of each individual case. Ownership may include several entitlements, notably the entitlement to use (*ius utendi*), dispose or alienate (*ius dispondendi*) and vindicate (*ius vindicandi*) the property. Other entitlements may include the entitlement to fruits (*ius fruendi*); to possess (*ius possidendi*), to resist any unlawful invasion (*ius negandi*), encumber and (under some circumstances) even neglect or destroy the property (*ius abutendi*). Compare Mostert & Pope (eds) *The Principles of the Law of Property* 92-93; Van der Walt & Pienaar *Introduction to the Law of Propert* 47-48; Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 92-93; Van der Merwe *Sakereg* 173.

[24] AJ van der Walt "Property, social justice and citizenship: Property law in post-apartheid South Africa" (2008) *Stellenbosch Law Review* 325-346, 325; H Mostert "Land as a 'national asset' under the Constitution: The system change envisaged by the 2011 Green Paper on Land Policy and what this means for property law under the Constitution" (2014) 17 *Potchefstroom Electronic Law Journal* 760-797, 772.

[25] 1979 2 SA 1113 (T).

[26] *Gien v Gien* 1979 2 SA 1113 (T) at 1120. The Constitutional Court in *Van der Merwe v Taylor* 2008 1 SA 1 (CC) para 26 added a constitutional element to the concept of ownership laid down in *Gien v Gien*. The Court describes the concept of ownership as *potentially* conferring upon the owner "the most complete or comprehensive right in or control over a thing". The Court held further that: "The most comprehensive control over the property does not imply unfettered freedom to do with the thing as one pleases. However comprehensive, and although protected against arbitrary deprivation under section 25(1), ownership like any other right, is not absolute". See further Badenhorst, Pienaar and Mostert *The Law of Property* 91-92; CG van der Merwe & A Pope "Property" in FD Bois (ed) *Wille's Principles of the South African Law* 9 ed (2007) 405-665, 410; Mostert & Pope *The Principles of the Law of Property* 345.

[27] Mostert & Pope *The Principles of The Law of Property* 90.

[28] Mostert & Pope *The Principles of The Law of Property* 116-157; Van der Merwe *Sakereg* 176-178 and Badenhorst, Pienaar & Mostert *The Law of Property* 95.

[29] Van der Walt & Pienaar *Introduction to the Law of Property* 93; Mostert & Pope *The Principles of The Law of Property* 116-157; Van der Merwe *Sakereg* 176-178 and Badenhorst, Pienaar & Mostert *The Law of Property* 95; Scott (2011) *Acta Juridica* 23; Birks (1985) *Acta Juridica* 1; Visser (1985) *Acta Juridica* 39.

[30] Van der Walt & Pienaar *Introduction to the Law of Property* 93.

described as an "abstract legal relationship"[31] which implies: (a) the existence of "a legal relationship…between the owner and a thing (object) in terms of which the owner acquires certain entitlements"[32] and (b) "the existence of a relationship…between the owner and other legal subjects in terms of which the owner can require that others respect his entitlement regarding the object".[33]

Nevertheless, the notion of ownership as assigning absolute power over property, especially in so far as it relates to the ability to exclude others from using and enjoying the resource, was a widely accepted interpretation of the concept,[34] which suited the purposes of the South African government well during the time of apartheid.[35] In the South African context, ownership entitlements and the ability to exercise ownership, were specifically also affected by the race-based approach to land during the apartheid era.[36] Consequently, private ownership in general and ownership of land in particular, has been and remains contentious.[37] In the constitutional dispensation, private ownership continues to exist,[38] but must coincide with modern day practice, be aligned with future needs of the South African society, and endorse constitutional and transformational demands.[39]

Accordingly, the concept of ownership in the constitutional era requires a different interpretation. In this regard Van der Walt explains that:

> "[T]raditional notions of property [and ownership] do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to…public purpose restrictions; the point is to

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[31] Van der Walt & Pienaar *Introduction to the Law of Property* 53.
[32] 53.
[33] 53.
[34] Mostert (2014) *PELJ* 773; Van der Merwe *Sakereg* 12-13; J Scholtens "Law of Property" in HR Hahlo & E Kahn (eds) *The Union of South Africa: The Development of its Laws and Constitution*, 571-621, 578-579.
[35] *Daniels v Scribante* 2017 4 SA 341 (CC) paras 14-21, 90; Mostert & Pope *The Principles of The Law of Property* 90. See also AJ van der Walt "Property rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa" (1999) 64 *Koers* 261-264.
[36] JM Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309-329, 311-314; *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC) paras 34-36. See also Mostert & Pope *The Principles of The Law of Property* 90-91, 116. See also Van der Walt (1999) 64 *Koers* 261-264.
[37] Mostert & Pope *The Principles of The Law of Property* 90.
[38] 91.
[39] Badenhorst, Pienaar & Mostert *The Law of Property* 93. *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 49-50; *Offit Enterprises v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) para 46.

> identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests."[40]

In this regard, the Constitutional Court in *Daniels v Scribante*[41] held that, within a constitutional context, "a re-appraisal of our conception of the nature of ownership and property"[42] is required. The Court furthermore demonstrated the unfeasibility of the absolutist conception of ownership in the constitutional context.[43] The Court explained that "the traditional or common law conception of ownership creates a hierarchy of rights with ownership at the top and lesser real and personal rights that may in circumscribed circumstances subtract from it".[44] The courts have rejected this absolutist conception of ownership in the constitutional era.[45] The Court also referred to the judgment of the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*[46] which held that:

> "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law…The judicial function…is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not be dispossessed of a home or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case".[47]

Specifically, section 25 "provides for reform of land, which indicates that a more socially responsible form of ownership is envisaged for the future".[48] While ownership or property

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[40] AJ van der Walt *Property in the Margins* (2009) 16; *Daniels v Scribante* 2017 4 SA 341 (CC) para 136 also refers to this quotation.
[41] 2017 4 SA 341 (CC).
[42] *Daniels v Scribante* 2017 4 SA 341 (CC) para 115(b).
[43] Para 133.
[44] Para 134.
[45] *Daniels v Scribante* 2017 4 SA 341 (CC) paras 133, 135. See also Van der Walt & Dhliwayo (2017) *SALJ* 34-52 and P Dhliwayo & R Dyal-Chand "Property in Law" in G Muller, R Brits, B Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in honour of AJ van der Walt* (2018) 295-317 in general.
[46] 2005 1 SA 217 (CC).
[47] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23; Van der Walt & Dhliwayo (2017) *SALJ* 34-52 and Dhliwayo & Dyal-Chand "Property in Law" in *Transformative Property Law: Festschrift in honour of AJ van der Walt* 295-317 in general.
[47] 2005 1 SA 217 (CC).
[48] Mostert & Pope *The Principles of The Law of Property* 91. See also *Van der Merwe v Taylor* 2008 1 SA 1 (CC) para 26; *Daniels v Scribante* 2017 4 SA 341 (CC) para 13; Van der Walt *Property in the Margins* 16. See also L van Vliet & A Parise "The development of the social function of ownership: Exploring the pioneering efforts of Otto von Gierke and Léon Duguit" in G Muller, R Brits, B Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in honour of AJ van der Walt* (2018) 265-294, 275-276.

may be regulated to address the need for the redistribution of agricultural land,[49] property, and the ownership entitlements attached thereto, are protected by section 25 of the Constitution, which provides for a framework that regulates the context and manner in which private property may be interfered with.[50] The Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance*[51] held that the overriding purpose of the constitutional property clause is to strike a proportionate balance between the protection of existing property rights and the promotion of the public interest.[52]

Van der Walt describes section 25 of the Constitution as "unique"[53] in its combination of two seemingly contradictory parts. Part 1, consisting of sections 25(1)-(3), embodies the provisions that protect existing property rights and interests against unconstitutional interferences.[54] In contrast, part 2, comprising sections 25(4)-(9), provides for a set of provisions that allows State action that promotes land reform and other related reforms, including the redistribution of land.[55] Apart from this categorisation, Van der Walt further divides these two parts into four groups of provisions that deal with (a) deprivation; (b) expropriation; (c) interpretation; and (d) land reform.[56] For purposes of this Chapter, the focus falls on the interaction between section 25(1), section 25(2) and section 25(5) of the Constitution, namely the regulation of the land owner's entitlements in light of redistribution purposes. In view of the need to broaden access to land and redress the skewed ownership patterns in relation to agricultural land for South African citizens specifically, various regulatory mechanisms emerge that impact property holders, namely citizens and foreigners, generally and on agricultural land specifically. These regulatory mechanisms are discussed below.

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[49] HP Binswanger-Mkhize, C Bourguignon & R van den Brink "Introduction and summary" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 3-42.
[50] Van der Walt *Constitutional Property Law* 91; Van der Sijde *Reconsidering the relationship between property and regulation* 128.
[51] 2002 4 SA 768 (CC).
[52] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 50.
[53] Van der Walt *Constitutional Property Law* 12.
[54] Van der Walt *Constitutional Property Law* 12; Pienaar *Land Reform* 174-179.
[55] Sections 25(5) and 25(8) of the Constitution of the Republic of South Africa, 1996. See also Van der Walt *Constitutional Property Law* 12; Pienaar *Land Reform* 179-185.
[56] Van der Walt *Constitutional Property Law* 16-22; Pienaar *Land Reform* 175-176.

3 Mechanisms for the regulation of agricultural land

3 1 Introduction

Property is protected in terms of section 25 of the Constitution. However, as explained above, the constitutional protection of property is not absolute and may be subjected to regulatory provisions or measures.[57] There are various regulatory mechanisms, each with a different underlying aim,[58] that impact ownership entitlements in relation to rural[59] and urban land.[60] Furthermore, as mentioned above,[61] the concept of ownership can also be described as a relationship between the owner and the property and/or as a relationship between the owner and other legal subjects with limited real rights or personal rights.[62] In this regard, the scope of the study is not aimed at regulatory measures that may impact the relationship between the land owner and other legal subjects working or residing on the agricultural land, such as labour tenants[63] and occupiers.[64] It would not be possible to discuss all regulatory mechanisms for purposes of this dissertation. Accordingly, in light of section 25(5) of the Constitution, the focus falls on regulatory measures that may impact ownership entitlements

[57] Van der Walt *Constitutional Property Law* 190; Badenhorst, Pienaar & Mostert *The Law of Property* 96; Mostert & Pope (eds) *The Principles of The Law of Property* 116. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 49-50; *Offit Enterprises v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) para 46.

[58] For example, redistribution, tenure security, restitution, land use planning; township establishment, spatial planning and land management, and environmental, conservation and heritage considerations.

[59] Generally, land tax, the Spatial Planning and Land Use Management Act 16 of 2013 and Expropriation Act 63 of 1975 may impact all land. Rural land acts that may impact ownership entitlements include: the Land reform (Labour Tenants) Act 3 of 1996; the Extension of Security of Tenure Act 62 of 1997; the Restitution of Land Rights Act 22 of 1994; the Restitution of Land Rights Amendment Act 15 of 2014; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Land Reform: Provision of Land and Assistance Act 126 of 1993; the Subdivision of Agricultural Land Act 70 of 1970; the Environmental Conservation Act 73 of 1989; the National Environmental Management Act 107 of 1998; the National Environmental Management Act: Protected Areas 57 of 2003; the Conservation of Agricultural Resources Act 43 of 1983; the Agricultural Pests Act 36 of 1983; the National Veld and Forest Fire Act 101 of 1998; and the Fencing Act 31 of 1963.

[60] The Spatial Planning and Land Use Management Act 16 of 2013 and Expropriation Act 63 of 1975 may impact all land. Other acts that specifically impact urban land include: the National Building Regulations and Building Standards Act 103 of 1977; the Housing Act 107 of 1997; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Environment Conservation Act 73 of 1989 and the National Environmental Management: Air Quality Act 39 of 2004.

[61] See 2 above.

[62] Van der Walt & Pienaar *Introduction to the Law of Property* 53.

[63] Land Reform (Labour Tenants) Act 3 of 1996. Van der Walt & Pienaar *An Introduction to the Law of Property* 369 provides that: "[l]abour tenants are entitled to apply, within four years from the commencement of the Act, to acquire land which they may occupy or use in terms of the labour tenancy. By making it possible for the labour tenants to acquire their own land, the Act promotes a more equitable distribution of land". See also Pienaar *Land Reform* 307-317.

[64] The Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from the Unlawful Occupation of Land Act 19 of 1998.

in relation to agricultural land specifically and which may contribute to the redistribution programme.

The study is limited to statutory regulatory mechanisms, excluding land tax measures,[65] which impact the relationship between the land owner and the agricultural land in question. In this regard, the following regulatory mechanisms in relation to agricultural land will be discussed: (a) provisions relating to the subdivision of agricultural land; (b) placing ceilings on agricultural landholdings; and (c) placing restrictions on foreigners to acquire and dispose of agricultural land.

3 2 Provisions relating to the subdivision of agricultural land

3 2 1 Introduction

The provisions relating to the subdivision of agricultural land can be found in the SALA and the Land Reform: Provision of Land and Assistance Act 126 if 1993 ("Act 126").[66] The aims of these statutory measures differ. The former act restricts the way in which owners exercise respective rights in relation to immovable property.[67] The latter act, while it does not impact landowners' entitlements, it allows the State to subdivide land acquired under the Act for purposes of redistribution. These two Acts, in relation to the subdivision of agricultural land, are discussed below.

3 2 2 The Subdivision of Agricultural Land Act 70 of 1970

SALA acts as a regulatory mechanism that aims to protect agriculture as an economic activity and preserve agricultural land, by preventing the subdivision of large-scale

[65] Pienaar *Land Reform* 371. Land tax measures are well-known mechanisms and widely used to open up land for redistribution purposes.

[66] Originally known as the Provision of Certain Land for Settlement Act 126 of 1993. The Act has since undergone further amendments including, the Land Affairs General Amendment Act 11 of 2000; the Provision of Land and Assistance Amendment Act 58 of 2008 and the Rural Development and Land Reform General Amendment Act 4 of 2011. Since 2011, the Act has been known as the Land Reform: Provision of Land and Assistance Act 126 of 1993. See also T Kepe & R Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 22-09-2019) 8 where the report reiterates that: "While it is an apartheid-era law, passed by the National Party government during its own limited and pre-emptive attempts at land reform, it remains the legislation that enables the Minister to acquire funds for disbursement. The amendments to the Act have provided a mandate to the Minister to continue to appropriate funds to enable land redistribution under changed conditions".

[67] G Frantz *Repealing the Subdivision of Agricultural Land Act: A constitutional analysis* LLM, Stellenbosch University (2010) 78.

agricultural land into small, uneconomic land parcels.[68] It also prevents agricultural land from decreasing due to the expansion of townships and urban sprawl.[69]

As mentioned, to achieve this aim, SALA regulates the subdivision of all agricultural land in the Republic[70] and other actions that may result in the subdivision of agricultural land. The use of agricultural land is often determined by the size thereof. Accordingly, the provisions relating to the subdivision of agricultural land not only impacts the use of the land itself, but also have an effect on the land owner's right to use the land as he/she pleases, as well as to dispose of his or her land through sale and bequests. The scope of the regulatory measures imposed by SALA on the land owner's property rights is discussed forthwith.

3 2 2 1 The scope / extent of the limitations in SALA

SALA prohibits the subdivision of agricultural land provided that consent for the subdivision is obtained from the Minister of Agriculture, Land Reform and Rural Development (previously the Minister of Agriculture, Forestry and Fisheries).[71] This prohibition aims to prevent the uneconomic fragmentation of prime agricultural land.[72] There are also other actions listed in SALA that are prohibited unless ministerial consent is obtained. These actions deal with the transfer of agricultural land and actions that may result in the act of subdivision.

In this regard, section 3(b) provides that "no undivided share in agricultural land not already held by any person, shall vest in any person…unless the Minister has consented in writing".[73] This section aims to prevent the owner of agricultural land from transferring any undivided share in the ownership to another person without the Minister's consent.[74] However, this section does not preclude agricultural land from being registered as a partnership asset.[75] The only requirement is that the land be registered in the name of one partner, but not necessarily the other partner or partners.[76] Accordingly, the partner with the registered right has a real right, whereas the other(s) have a personal right against the

[68] *Coetzee v Coetzee* 2016 4 All SA 404 (WCC) para 26. See also Pienaar *Land Reform* 350; J van Wyk *Planning Law* 2 ed (2012) 380. See also Frantz *Repealing the Subdivision of Agricultural Land Act* in general.
[69] Pienaar *Land Reform* 350; Van Wyk *Planning Law* 380.
[70] Frantz *Repealing the Subdivision of Agricultural Land Act* 1; *Coetzee v Coetzee* 2016 4 All SA 404 (WCC) para 6.
[71] Section 3(a) of the Subdivision of Agricultural Land Act 70 of 1970; Frantz *Repealing the Subdivision of Agricultural Land Act* 46.
[72] *Coetzee v Coetzee* 2016 4 All SA 404 (WCC) para 26.
[73] Section 3(b) of the Subdivision of Agricultural Land Act 70 of 1970.
[74] Badenhorst, Pienaar & Mostert *The Law of Property* 107-108.
[75] Badenhorst, Pienaar & Mostert *The Law of Property* 107-108; *Cussons v Kroon* 2002 1 All SA 361 (A) 838E-G.
[76] Frantz *Repealing the Subdivision of Agricultural Land Act* 46.

partner to manage the agricultural land as a partnership asset.[77] In other words, while the immovable property, namely the agricultural land, forms part of the assets of the partnership, only the registered owner obtains ownership entitlements over it.

Furthermore, section 3(c) of SALA provides that "no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person"[78] unless the Minister has consented thereto in writing.[79] The purpose of this section is to prevent the uncontrolled division of agricultural land into uneconomic parcels of land and the further division of such land into smaller shares,[80] by prohibiting the holder of an undivided share in ownership of agricultural land from transferring a portion of his or her undivided share to another.[81] However, as Badenhorst, Pienaar and Mostert explain, there is:

> "nothing which prevents the holder of two or more undivided shares in ownership of a single piece of land from transferring one (or more) of these shares to another, whether or not the latter already holds any share in the ownership of such land. The intention of the legislature was, therefore, to prevent the uncontrolled division of agricultural land into smaller (uneconomic units), as well as the further division of existing undivided shares in the ownership of such land into smaller "shares" ".[82]

SALA also prohibits anyone from entering into a long-term lease which continues for any period over 10 years, unless ministerial consent is obtained in writing.[83] The option to renew the lease after a period of 9 years and 11 months is also invalidated.[84]

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[77] Frantz *Repealing the Subdivision of Agricultural Land Act* 46. Badenhorst, Pienaar & Mostert *The Law of Property* 107-108, 135. See *Cussons v Kroon* 2002 1 All SA 361 (A) 838G-H, which illustrates the position where agricultural land is registered as a partnership asset.

[78] Section 3(c) of the Subdivision of Agricultural Land Act 70 of 1970.

[79] Section 3(c) of the Subdivision of Agricultural Land Act 70 of 1970.

[80] Badenhorst, Pienaar & Mostert *The Law of Property* 108. However, in *Coetzee v Coetzee* 2016 4 All SA 404 (WCC) paras 26-32 the High Court found that there were various factors which weighed in favour of subdivision. The Court held that the application for subdivision of the farm in such a way that would allow the appellant to remain in the cottage had realistic prospects of success. Consequently, the Court found that although various statutory consents would be required for the partitioning of the property, it did not, in the circumstances of the case, justify adopting an approach that ruled out terminating the parties' co-ownership by way of a physical division between them of the commonly owned property. In the result, the appeal was upheld, the co-ownership of the farm was terminated, and permission to subdivide was granted.

[81] Frantz *Repealing the Subdivision of Agricultural Land Act* 48.

[82] Badenhorst, Pienaar & Mostert *The Law of Property* 107. See *Coetzee v Coetzee* 2016 4 All SA 404 (WCC) paras 26-32.

[83] Section 3(d) of the Subdivision of Agricultural Land Act 70 of 1970; Frantz *Repealing the Subdivision of Agricultural Land Act* 48.

[84] See *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A) where the option to renew the lease contract in question, had the potential to create a long-term lease, without prior written consent from the

Furthermore, the sale and advertisement for sale of a portion of agricultural land is also expressly prohibited in terms of SALA, unless written consent is obtained from the Minister.[85] SALA also limits the entitlement of an owner of agricultural land from granting and registering certain servitudes over his or her land.[86] This section excludes certain servitudes from the requirement of ministerial consent. The inclusion of certain servitudes under the requirement of consent may be regarded as a way to prevent the registration of servitudes that are in fact masked as lease agreements. SALA is thus not only a source which provides a definition of agricultural land,[87] it is also a regulatory mechanism that impacts particular entitlements of land owners.[88]

It is questioned whether the provisions relating to the subdivision of agricultural land are in conflict with section 25 of the Constitution.[89] The constitutionality of provisions on subdivision in SALA is explored in Chapter 4 below.

3 2 2 2 New developments: The Preservation and Development of Agricultural Land Bill

Once promulgated, the 2016 Preservation and Development of Agricultural Land Bill[90] ("Preservation Bill") will replace SALA. The new Act when/if promulgated, will not only provide a new definition of agricultural land,[91] but will also provide a corresponding framework for the subdivision and regulation of agricultural land. Although not yet finalised, it is evident that the subdivision of agricultural land will still be prohibited unless authorised by the Minister.[92]

Minister. Accordingly the Appeal Court found the lease contract in contravention of section 3(d) of the Subdivision of Agricultural Land Act 70 of 1970 and invalidated it.

[85] Section 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970; Frantz *Repealing the Subdivision of Agricultural Land Act* 50. See *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 2 SA 150 (SWA); *Smith v Tuckers Land Development Corporation (Pty) Ltd; Tuckers Land Development Corporation (Pty) Ltd v Smith* 1984 2 SA 166 (T) and *Tuckers Land Development Corporation (Pty) Ltd v Wasserman* 1984 2 SA 157 (T). These cases illustrate the extensions and limitations of the restriction to sell or advertise for sale a portion of agricultural land where the required ministerial consent was not obtained. See further *Geue v Van der Lith* 2003 4 All SA 553 (SCA) which also deals with the court's interpretation of section 3(e) of the Subdivision of Agricultural Land Act 70 of 1970 and the scope of the sale of a portion of agricultural land.

[86] Section 6A of the Subdivision of Agricultural Land Act 70 of 1970.

[87] See Chapter 2, 2 above.

[88] The content of ownership must be determined within the context of each individual case. Compare Mostert & Pope *The Principles of the Law of Property* 92-93; Van der Walt & Pienaar *Introduction to the Law of Property* 47-48; Badenhorst, Pienaar & Mostert *The Law of Property* 92-93; Van der Merwe *Sakereg* 173. As the Subdivision of Agricultural Land Act 70 of 1970 prohibits the subdivision of agricultural land without ministerial consent, it restricts the owner's ability/competency to freely use and alienate his or her property.

[89] See Chapter 4, 3 4 2 1 below.

[90] The Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016.

[91] See Chapter 2, 2 above.

[92] Clause 19 of the Preservation and Development of Agricultural Land Bill.

The objectives of the Preservation Bill are to (a) promote the preservation and sustainable development of agricultural land; (b) identify and demarcate protected agricultural areas for sustainable use and development; (c) put in place measures to promote long-term viable and resilient farming units; (d) provide for measures, such as subdivision restrictions, to prevent the fragmentation of agricultural land; (e) prohibit and discourage land use changes from agriculture to other forms of development; (f) implement a national framework on the use of agricultural land; (h) provide for a framework that facilitates concurrent land uses on agricultural land; and (i) set up a National Agricultural Land Registry for all activities on agricultural land.[93] The objectives of the Preservation Bill are therefore be more complex and encompassing, compared to the aim of SALA.

To give effect to these objectives, chapter 2 of the Preservation Bill provides for "agricultural land management". "Agricultural land management" includes the establishment of: (a) principles, norms and standards pertaining to the use of agricultural land; (b) an agricultural land classification system which focuses on the land capability; (c) agricultural sector plans; (d) protected agricultural areas; (e) agricultural land uses which include "farm uses", "permitted uses" and "non permitted uses"; and (f) the regulation of change in agricultural land uses through subdivision restrictions. Chapter 5 also provides for the establishment of a National Agricultural Land Register which will provide data on agricultural land management in South Africa. According to the Preservation Bill, the National Agricultural Land Register may contain the following information:

> "(a) spatial information on all agricultural land, including – (i) capability, suitability, potential and status of the natural agricultural resources; and (ii) socio-economic information; (b) per agricultural land parcel – (i) the use of agricultural land, (ii) information on the landowner, company or trust; including the nationality and gender and where applicable the land user, and (iii) any other information as may be prescribed by the Minister from time to time".[94]

In light of its complexity and the development of other legislative instruments, such as the Regulation Bill of 2017, it is unlikely that the Preservation Bill will pass through Parliament as initially scheduled.[95] Already in 2018, during a briefing on its Quarter 2 Preliminary

[93] Preamble and clause 3 of the Preservation and Development of Agricultural Land Bill.
[94] Clause 50 of the Preservation and Development of Agricultural Land Bill.
[95] On 13 March 2015, the Minister of Agriculture published a draft policy and Bill on the preservation and development of agricultural land. However, following stakeholder input, a revised Bill was published on 2 September 2016. Subsequently, in February 2017 the Department of Agriculture, Forestry and Fisheries announced that the revised Bill will be reconsidered and redrafted and submitted to Parliament in 2019/2020.

Organizational Performance Report for 2017/18, the previous Department for Agriculture, Forestry and Fisheries announced[96] that the Preservation Bill would be reconsidered and redrafted. According to the Department, the Office of the Chief State Law Advisor ("OCSLA") raised a number of concerns relating to the (a) possible infringement of powers in light of the concurrent mandate of the Bill and the respective responsibilities and roles of the different spheres of governments and departments; and (b) the constitutionality of the Bill.

3 2 3 Land Reform: The Provision of Land and Assistance Act 126 of 1993

Act 126 aims to *inter alia* (a) provide for the designation of certain land; (b) to regulate the subdivision of "designated land"[97] acquired under the Act; (c) to provide for the rendering of financial assistance for the acquisition of land and; (d) to secure tenure rights.[98]

There may be cases where a private land owner makes agricultural land available to the Minister of Agriculture, Land Reform and Rural Development (previously the Minister of Rural Development and Land Reform) in order to broaden access to land and effect redistribution.[99] Generally, it is time-consuming and hampers the general flow of the redistribution process where a land owner has to apply for Ministerial consent under SALA for the subdivision of agricultural land.[100] The usual laws regulating subdivision of agricultural land in SALA are therefore exempted from the operation of Act 126, unless the Minister directs otherwise.[101] Accordingly, where redistribution projects flow directly from Act 126, the subdivision of agricultural land is not an issue.[102] Pienaar explains that "the idea is that land is to be subdivided into smaller portions for purposes pertinent to rural areas,"[103]

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[96] Minister of Agriculture, Forestry and Fisheries "Preservation and Development of Agricultural Land Bill in the pipeline" (29 March 2018) <https://legal.sabinet.co.za/articles/preservation-and-development-of-agricultural-land-bill-in-the-pipeline/> (accessed 09-04-2019).

[97] According to section 1 of the Land Reform: The Provision of Land and Assistance Act 126 of 1993 "designated land" means land which is designated for settlement.

[98] Preamble of the Land Reform: The Provision of Land and Assistance Act 126 of 1993. See also Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 8.

[99] Section 2(1)(c) of the Land Reform: The Provision of Land and Assistance Act 126 of 1993. Other land, including State land which is made available for redistribution and settlement and land which is purchased by the State for redistribution and settlement may also be designated. See also Pienaar *Land Reform* 287.

[100] Pienaar *Land Reform* 290.

[101] Section 2(4) read with sections 5 and 10(2) of the Land Reform: The Provision of Land and Assistance Act 126 of 1993; Pienaar *Land Reform* 288; Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 8.

[102] Pienaar *Land Reform* 351. The Provision of Land and Assistance Act 126 of 1993; the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997 which have been promulgated to provide for the redistribution of land specifically, do not require compliance with the provisions dealing with the subdivision of agricultural land in the Subdivision of Agricultural Land Act 70 of 1970.

[103] Pienaar *Land Reform* 288.

including small-scale farming. The Minister retains the power to make regulations concerning any aspect of the Act, including the size of subdivided portions.[104]

3 2 4 Subdivision: A constraint to redistribution?

Where the redistribution of agricultural land flows directly from the operation of Act 126, the general restrictions on subdivision of agricultural land do not pose a constraint to land reform and the redistribution process. The prohibition against subdivision of agricultural land in SALA is precluded from the operation of Act 126. However, where other projects are concerned that do not fall inside the scope and operation of Act 126, SALA "continues to have important implications for redistribution, especially where private [agricultural] land is concerned".[105] SALA restricts when and how the subdivision of privately-owned agricultural land may take place. As explained, it was originally intended to prevent the fragmentation of agricultural land into uneconomic units. Kepe and Hall explain that SALA was intended to be used "for zoning purposes, as a measure to limit changes in land use and specifically to guard against the subdivision of agricultural land for residential purposes,"[106] to ensure that farms operate as "economic units" or "viable farm sizes".[107] Accordingly, the argument whether subdivision of agricultural land is regarded as a constraint to land reform and redistribution purposes, also turns on the debate whether small or large-scale farms are more productive.

Those in favour of subdivision argue that there are "few intrinsic economies of scale in primary production and that, other things being equal, smaller landholdings in which there is no hired labour are more efficient than large farms",[108] while others argue the inverse. In line with the argument in favour of small-scale production, Parliament passed the

[104] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 8.
[105] Pienaar *Land Reform* 351.
[106] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 46.
[107] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 46.
[108] 46.

Subdivision of Agricultural Land Act Repeal Act 64 of 1998.[109] The 1997 Memorandum on the objects of the Subdivision of Agricultural Land Act Repeal Bill,[110] expressly provides that:

> "It is no longer necessary to control the subdivision of agricultural land or for Government to determine what constitutes an appropriate land size. Land users and the market should be determinant of the land size. Appropriate zoning measures are considered sufficient for the protection of high potential agricultural land. Alternative land protection measures are also possible under the Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983)."[111]

Despite being passed in September 1998, this Act was never signed into law. Kepe and Hall note that:

> "the most significant obstacles to subdivision for land reform purposes are not *legal*; rather there are substantial, financial, institutional and ideological obstacles…there are no state initiatives to promote subdivision, and inadequate incentives for owners to subdivide, because there is not a sufficiently large, secure market of small holders ready to purchase land…". [112] (own emphasis)

Pienaar notes that it is crucial that the land market supplies small-scale portions of agricultural land, if there is a genuine need for small agricultural landholdings and that "the financial grant system is structured in such a manner that small-scale [agricultural] land parcels may be acquired by way of small grants".[113] However, as mentioned by Kepe and Hall, this is not the case in the current South African climate.[114]

Furthermore, it can be argued that if SALA and Act 126 are read together, the prohibition on subdivision of agricultural land in SALA ensures that agricultural land identified for acquisition under Act 126 is not transferred to unintended beneficiaries. SALA seemingly does not pose a restraint on redistribution as such, but rather ensures that land owners do

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[109] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 46-47.
[110] [B 101-97] in *GG* 31-10-1997.
[111] Part 1 of the Memorandum on the Objects of the Subdivision of Agricultural Land Act Repeal Bill [B101-97], in *GG* 31-10-1997.
[112] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 47.
[113] Pienaar *Land Reform* 352.
[114] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 46-47.

not transfer parcels of land to beneficiaries, such as relatives, other than those identified by the State.

3 3 Land ceilings

3 3 1 Introduction

Essentially, land ceilings impose restrictions with regard to the maximum size of land any person or entity may own. Any land over and above the ceiling limit is regarded as surplus land. If an individual, a family or entity owns more land than the ceiling limit, then the surplus land is to be acquired in order to be redistributed. Land ceilings act as a redistributive regulatory measure, because it makes more land available to be redistributed for agricultural use, be it for subsistence, smallholder and/or emerging farmers' utilisation.[115] Employing this mechanism (or similar mechanisms) is not unique to South Africa as several countries have at some stage, as part of their land reform programmes instituted size limitations in relation to farming units, for example, India, Egypt, Mexico, Taiwan and the Philippines.[116] However, the imposition of land ceilings in some (if not most) of these countries has proven to be ineffective in relation to the redistribution of agricultural land.[117]

Since the new constitutional dispensation and the abolishment of a racially based land control system(s), South Africa has followed an approach to land where access is possible, for all persons, in principle.[118] This system is characterised by an open, unlimited market, which is not prescriptive with respect to farm sizes or the amount of agricultural land one person or entity may own.[119] It is also not tied to any racial or cultural backgrounds and dispositions. There have also been no restrictions on or conditions relating to how much land persons, including foreigners, may own.[120] Essentially, access to land is unrestricted, but subject to the imperative set out in section 25(5) of the Constitution in that the State has a duty to take necessary steps to broaden access to land for South African citizens.[121]

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[115] JF Kirsten *Reflections on 25 years of engagement with the land question in South Africa* Inaugural lecture delivered on 21 November 2017, Stellenbosch University 14.
[116] These countries were all listed in the Department of Rural Development and Land Reform *Agricultural Landholding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 12-17.
[117] 12-17.
[118] JM Pienaar "Land Reform: January to March" (2017) 1 *Juta Quarterly Review* 1-8 1. See also Pienaar *Land Reform* 276-280 for more background on global approaches to access to land.
[119] Pienaar *Land Reform* 370.
[120] 370.
[121] Pienaar (2017) *JQR* 2.

Pienaar notes that "the first stirrings of regulating land holding generally emerged in the *Green Paper on Land Reform, 2011*[122] ("*Green Paper*") which sets out a "fourfold vision for land reform"[123] namely:

> (a) to reconfigure a single, coherent four-tier system of land tenure to ensure that everyone, but especially rural Blacks, has reasonable access to land with secure rights; (b) clearly defined property rights, sustained by a fair and accountable land governance system; (c) secure forms of long-term land tenure for resident 'non-citizens' engaged in appropriate investments which enhance food sovereignty and livelihood security; and (d) effective land use planning and regulatory systems".[124]

It is also the first document which provided for specific for foreign ownership of land. The *Green Paper* introduced the concept of a single land tenure framework, integrating the current multiple forms of land ownership (communal, State, public and private) into a single 4-tier tenure system.[125] This included the following: (a) State land and public land: leasehold; (b) privately owned land: freehold, with limited extent; (c) *land owned by foreigners*: freehold, but precarious tenure, with obligations and conditions to comply with; and (d) communally owned land: communal tenure with institutionalised use rights.[126]

While the *Green Paper* did not *create* any new land categories,[127] it was the first time reference was made to (a) "freehold, but with limited extent"[128] as a tenure system for private land,[129] and (b) the limitation on foreign property rights in an official policy document.[130] The

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[122] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011. See in general W Erlank "Green Paper on Land Reform: Overview and Challenges" (2014) 17 *Potchefstroom Electronic Law Journal* 614-640. See also JM Pienaar "Land Reform: January to March" (2015) *Juta Quarterly Review* 1-8 1; Pienaar (2017) *JQR* 1.
[123] Pienaar (2017) *JQR 2*.
[124] Pienaar (2017) *JQR* 1; Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011 4.
[125] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011; Department of Rural Development and Land Reform *Agricultural Landholding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 6.
[126] Pienaar (2017) *JQR* 1; Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011.6.
[127] All the categories existed before the publication of the Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011.
[128] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011 5-6.
[129] Pienaar *Land Reform* 244.
[130] 244-246.

Green Paper also acted as the strategic thrust behind the *Agricultural Landholding Policy Framework* of 2013.[131]

3 3 2 The Agricultural Landholding Policy Framework: The proposal of a land ceiling policy for South Africa

In July 2013, the *Agricultural Landholding Policy Framework* ("*ALPF*") was published.[132] The *ALPF* provided for broad information regarding the envisaged regulation of agricultural landholdings in South Africa within the 4-tier tenure system.[133] The policy document consists of three main sections: "(a) setting out the policy and the implementation thereof; (b) a legal comparative section; and (c) a summary of the whole of the document".[134]

3 3 2 1 The policy and the approach

Pienaar identifies two areas which the *ALPF* impacts on, namely: "(a) broadening access to land in general; and (b) placing restrictions on the quantity of land one individual or entity may own".[135] In other words, the *ALPF* aims to regulate access to land in general and agricultural land ownership specifically. As a result, the means of achieving the aforementioned aims may also impact the agricultural land market.[136] Ultimately, the *ALPF* aims to:

> "(a) facilitate the entry and participation of small farmers into mainstream agriculture; (b) redistribute land from large agricultural holdings to cooperatives and family owned landholdings; and (c) to increase efficiency, competitiveness and sustainability of all agricultural landholdings".[137]

The scope of the *ALPF* is limited to agricultural landholding, impacting all agricultural land in South Africa, regardless of where it is located; what the size of the landholding is; what

[131] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011; Department of Rural Development and Land Reform *Agricultural Landholding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013).
[132] Department of Rural Development and Land Reform *Agricultural Landholding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013). For a detailed discussion see, JM Pienaar "Land Reform: July to September" (2013) *Juta Quarterly Review* 1.3.3.
[133] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16-09-2011.
[134] Pienaar (2013) *JQR* 2.
[135] Pienaar (2013) *JQR* 2; Pienaar (2017) *JQR* 2.
[136] Pienaar (2013) *JQR* 2.
[137] Pienaar (2013) *JQR* 2; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 7.

the landholding is used for or who the owner of the land is.[138] In other words, *all agricultural landholdings* in urban and rural areas,[139] whether privately or publicly owned, including agricultural landholdings in former homeland areas[140] and commercial white farming areas,[141] will be tied to specific ownership bands.[142]

The approach of the *ALPF* is to provide for different agricultural landholdings types: upper, middle and lower band landholdings.[143] In relation to these bands, ceilings on ownership and use of privately owned commercial agricultural land are set.[144] Pienaar highlights that a three-pronged approach is proposed in this regard, namely

> "(a) [T]aking the necessary legislative and other steps to bring excessive agricultural landholdings below the ceiling point; (b) taking the necessary legislative and other measures to lift those holdings that are below the floor level; and (c) where holdings are operating within the bands, taking the necessary measures to optimise the exploitation of these holdings".[145]

The implementation strategy highlighted in the *ALPF* provides for different preliminary steps to be taken before setting out and implementing ceilings on agricultural landholdings. Firstly, district agricultural land use zones may be proclaimed through legislation such as the SPLUMA.[146] Secondly, the *ALPF* proposes to introduce compulsory disclosures in order to get an accurate picture of the district agricultural landholdings.[147] Once the disclosures are

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[138] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 8.
[139] Pienaar (2017) 2; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 8.
[140] In total there were 10 homelands (or Bantustans) in South Africa: Transkei, Bophuthatswana, Ciskei, Venda, Gazankulu, KaNgwae, KwaNdebele, KwaZulu, Lebowa and QwaQwa.
[141] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 8.
[142] Pienaar *Land Reform* 352.
[143] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 8-9.
[144] 8-9.
[145] Pienaar (2013) *JQR* 3; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 8-9.
[146] Pienaar (2013) *JQR* 3; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 9.
[147] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 9.

made, the third step would be to map out the agricultural landholdings at district level in order to determine the upper, middle and lower band landholdings.[148]

A District Land Reform Committee may then determine floor and ceiling levels once the lower, middle and upper bands have been proclaimed in a particular district.[149] The following factors, although not limited, may be used to calculate the floor and ceilings levels for each district: (a) climatic factors; (b) matters pertaining to the high value, medium value, unique use in terms of grazing and cropping of the land; (c) matters pertaining to the current production output, commodity-specific restraints, farm size, economies of scale, number of farm workers and dependents; (d) variations in physical potential in terms of the soil type, soil depth, water availability etc.; and (e) capital requirements of different enterprises.[150]

Once the District Land Reform Committee establishes the relevant bands, these measures would be employed, including expropriating the excess agricultural land above the ceiling. In this regard, expropriation would not only act as a way of acquiring agricultural land, but it would have also acted as a means of realising the regulatory framework envisioned in *ALPF*. In some areas, it may also be necessary to impose a right of first refusal to empower the State to acquire agricultural landholdings in excess of the proposed ceilings.[151] Interestingly, the *ALPF* proposes equity sharing arrangements[152] where it may not be viable to expropriate the excess land.[153]

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[148] Pienaar (2013) *JQR* 3; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 9-10.

[149] Pienaar (2013) *JQR* 3; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 10.

[150] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 10-11; Pienaar *Land Reform* 370.

[151] Pienaar (2013) *JQR* 3; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 11.

[152] See Chapter 5, 2 5 1 below. The 50/50 policy makes provision for equity sharing arrangements. In essence, farm workers are afforded shares in the farming enterprise but do not become owners (or co-owners) of the farm itself. However see SL Knight & MC Lyne "Perceptions of farmworker equity-schemes in South Africa" (2002) 41 *Agrekon* 356-374, 358 where the authors provide that: "A successful farm worker equity-share scheme should redistribute wealth and future benefit streams…and provide for the transfer of both ownership and control of commercial farms to previously disadvantaged workers in the long-term". See further, S Knight, M Lyne & M Roth "Best institutional arrangements for farm-worker equity-share schemes in South Africa" (2003) 42 *Agrekon* 228-251.

[153] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 11.

Legislation needed to be introduced to make such arrangements compulsory. The constitutional implications also needed to be considered.[154]

As mentioned, measures are also needed to elevate agricultural landholdings below the floor level[155] in order to operate above the floor level requirements. This is necessary to ensure that agricultural landholdings operate at the optimum production capacities. Where agricultural landholdings fall within the determined upper and lower levels, additional measures are also necessary to enable farmers to become more efficient, profitable, competitive and sustainable.

3 3 2 2 International comparison

The *ALPF* provides for a short comparative review of countries where land ceilings were utilised as part of the relevant country's land reform programme. The Policy specifically focuses on India,[156] Egypt, Mexico, the Philippines and Taiwan.[157] In this regard, the *ALPF* provides a broad overview and rather superficial comparative analysis of the imposition of land ceilings in the different countries. Although legal comparative work will be done in Chapter 9 below, it suffices to say at this stage that the imposition of land ceilings in some jurisdictions aggravated the existing problem of uneconomical fragmentised land holdings and failed to redistribute agricultural land effectively.[158] The reasons for the failure of the imposition of land ceilings are numerous and varied.[159] Some reasons, mentioned in the *ALPF*, include the cost of implementation, circumvention by spurious subdivisions, corruption and lack of accurate data on land-use capabilities and land values.[160]

Despite the clear indication that the imposition of land ceilings may yield a negative outcome,[161] all indications are that the South African government will move forward with its plan to implement ceilings on landholdings. This underlines the necessity for an in-depth study of the envisaged approach in South Africa. In this regard, the study aims to analyse

[154] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 11.
[155] The floor is the minimum point below which the total factor productivity of a family-owned and operated agricultural landholding becomes negative.
[156] See Chapter 8 below.
[157] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 13 - 17.
[158] 14.
[159] 16-17.
[160] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 16-17.
[161] 13-17.

whether the imposition of land ceilings in South Africa is constitutional[162] and effective.[163] Following a comparative analysis in Chapter 9, the potential success or failure of the imposition of land ceilings in South Africa will be discussed.

3 3 2 3 Announcements in relation to land ceilings

Subsequent to the *Green Paper* and *ALPF*, numerous uncoordinated and contradictory announcements and statements were made by the President and/or relevant Minister in the course of 2014 – 2016 regarding the limitation of land ownership.[164] For example, broad statements regarding the limitation of land ownership of South Africans (both natural and legal persons) were made during the 2015-State of the Nation address.[165] This entailed that ownership of farms would be restricted to 12 000 ha or two farms and that foreign land ownership would be prohibited.[166] Pienaar notes that "details were scant and specifics emerged slowly and sporadically thereafter, leading to much speculation and uncertainty"[167] and that "developments were seemingly kept under wraps while rumours circulated about draft legislation being finalised". [168] The first official version of the Regulation of Agricultural Landholdings Bill[169] ("Regulation Bill") made available in the public domain for comment appeared on 17 March 2017. The proposed Regulation Bill aims to give effect to the envisaged ceilings on landholdings proposed in the *ALPF*.

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[162] See Chapter 4, 3 4 2 2 below.
[163] See Chapter 6, 3 below.
[164] Government of South Africa, *State of the Nation Address* (2015) <https://www.gov.za/state-nation-address-2015> (accessed 28-01-2016); Pienaar (2017) *JQR* 2.
[165] Government of South Africa, *State of the Nation Address* (2015) <https://www.gov.za/state-nation-address-2015> (accessed 28-01-2016); Department of Rural Development and Land Reform, *2015/2016 financial year, budget policy speech* 8 May 2015. See also Pienaar (2017) *JQR* 2; Anon "ANC calls for faster land reform" (29-01-2015) *Fin24* <http://www.fin24.com/Economy/ANC-calls-for-faster-land-reform-2015-01-29> (accessed 09-04-2018); Q Hunter "ANC wants land cap of 12 000 hectares or two farms" (28-01-2016) *Mail and Guardian* 17; K Mabuza, TJ Strydom & P Dlamini "Land offensive" (29-01-2015) *Time Live* <http://www.timeslive.co.za/thetimes/2015/01/29/land-offensive> (accessed 9-04-2018); L Donnelly "Bitter fight looms over land'" (14-05-2015) <http://mg.co.za/article/2015-05-14-bitter-fight-looms-over-land/> (accessed 09-04-2018).
[166] Anon "ANC calls for faster land reform" (29-01-2015) *Fin24* <http://www.fin24.com/Economy/ANC-calls-for-faster-land-reform-2015-01-29> (accessed 09-04-2018); Hunter "ANC wants land cap of 12 000 hectares or two farms" (28-01-2016) *Mail and Guardian* 17; Mabuza, Strydom & Dlamini "Land offensive" (29-01-2015) *Time Live* <http://www.timeslive.co.za/thetimes/2015/01/29/land-offensive> (accessed 9-04-2018). See also Department of Rural Development and Land Reform, *2015/2016 financial year, budget policy speech* 8 May 2015. In this regard see Donnelly "Bitter fight looms over land'" (14-05-2015) <http://mg.co.za/article/2015-05-14-bitter-fight-looms-over-land/> (accessed 09-04-2018).
[167] Pienaar (2017) *JQR* 2.
[168] 2.
[169] The Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.

3 3 3 The Regulation of Agricultural Landholdings Bill

The Regulation Bill[170] aims, *inter alia*, to reverse the legacy of colonialism and apartheid and also to ensure a just and equitable distribution of agricultural land to Africans.[171] The Regulation Bill provides amongst others, for the establishment of the Land Commission; the declaration of present ownership; the acquisition of private agricultural land; and the maintenance of a national register in respect of such agricultural declarations; the determination of ceilings in respect of agricultural land; and for the prohibition against acquisition of agricultural land ownership by foreign nationals. The last mentioned aspect is dealt with separately below.[172]

3 3 3 1 Exposition of the chapters of the Regulation Bill

The Regulation Bill consists of nine chapters. Pienaar points out that the preamble to the Regulation Bill centres on (a) "section 25 of the Constitution, the property clause,"[173] and (b) "highlights the state's duty to take reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis".[174] As mentioned in Chapter 1, the State's duty to broaden access to land is linked to sections 25(5) and 25(8) of the Constitution, which states that no provision may impede the State from taking the necessary measures to effect land, water and related reform.[175] The need for the redistribution of agricultural land is furthermore linked to specific, possibly conflicting goals, namely:

> "(a) to effect a more equal redistribution in light of race and class; (b) to raise agricultural output; (c) to raise food security; (d) to advance social justice; (e) to advance political stability; (f) to support and promote productive employment; and (g) to support and promote income to poor and efficient small scale farmers".[176]

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[170] The Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.
[171] Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017 37. Clause 2 of the Regulation of Agricultural Land Holdings Bill also provides that the objects of the Bill are to obtain agricultural land for redistribution in order to support and promote productive employment and income to poor and efficient small scale farmers; ensure redress for past imbalances in access to agricultural land; promote food security; provide a transparent and more conducive regulatory framework for the generation and utilisation of policy-relevant information on agricultural land ownership and usage; provide certainty regarding the ownership of public and private agricultural land and enable the State to effectively deliberate on matters of land, natural resource economics, property market and extent of land use.
[172] See 3 3 3 1 6 and 3 4 below.
[173] Pienaar (2017) *JQR* 2.
[174] Pienaar (2017) *JQR* 2; preamble of the Regulation of Agricultural Land Holdings Bill.
[175] Preamble of the Regulation of Agricultural Land Holdings Bill.
[176] Pienaar (2017) *JQR* 2; preamble of the Regulation of Agricultural Land Holdings Bill.

3 3 3 1 1 Chapter 1: Interpretation, objects and application of the Regulation Bill

Chapter 1 deals with the interpretation,[177] objectives[178] and application of the Bill.[179] The Regulation Bill focuses on agricultural land holdings specifically.[180] Therefore, the concept of "agricultural land"[181] is integral to the operation and implementation of the Regulation Bill.[182] The approach to agricultural land is that *all land* is included, with some listed exclusions.[183] The concept of "agricultural land" as provided for in the Regulation Bill was discussed in Chapter 2 and will this not be repeated here.

Furthermore, in light of the importance of providing access to citizens,[184] the concepts of "citizen"; "foreign person" and "foreign juristic person" are also set out.[185] The interpretation of these concepts is pivotal to the operation and implementation of the Regulation Bill. The provisions of the Regulation Bill impact both natural and juristic persons.[186] In this regard, the concept of "citizen" and "foreign person" includes juristic persons.[187] Furthermore, a separate definition of "juristic person" is provided for.[188] For purposes of the Regulation Bill a juristic person is deemed to be "Black" [189] where Black citizens own and control 50% or more of such juristic person.[190]

Furthermore, an "owner" of agricultural land is defined as the person in whose name the agricultural land is registered,[191] including agricultural land held by (a) a trustee in a trust (but excluding State trust land);[192] (b) the executor of the estate or the Master where the owner is deceased; (c) a provisional or final trustee of an insolvent estate where a sequestrated estate is at hand; (d) the provisional or final liquidator of the company, where

[177] Clause 1 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[178] Clause 2 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[179] Clause 3 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[180] Pienaar (2017) *JQR* 2.
[181] See Chapter 2 above.
[182] See Chapter 2, 3 above.
[183] See Chapter 2, 3 above.
[184] Section 25(5) of the Constitution of the Republic of South Africa, 1996; preamble of the Regulation of Agricultural Land Holdings Bill.
[185] Pienaar (2017) *JQR* 2.
[186] 2.
[187] 2.
[188] Clause 1(3) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[189] Black people as defined in the Employment Equity Act 55 of 1998. In terms of this Act, section 1 defines "black people" as a generic term which means "Africans, Coloureds and Indians".
[190] Clause 1(3) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[191] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[192] There is no definition of "state trust land" provided for in the Regulation Bill. Large portions of land are held in trust by the State, which impacts on communal land in former Bantustan areas specifically. If land held in trust by the State is excluded from the operation of the Regulation Bill, then important agricultural areas/ land for food production and food security, are also excluded from the Regulation Bill.

a company is being wound up; where the owner is legally incapacitated, the representative by law; (e) the sheriff or deputy sheriff where agricultural land was attached by order of court; and finally, (f) an authorised representative of the owner.[193]

"Public agricultural land" is also defined broadly, as including all agricultural land that vests in any of the various levels of government and/or public entities.[194] However, communal land or land held in trust by the State is not mentioned in this definition. This raises two questions in particular, namely (a) whether all communal agricultural land is excluded from the scope of the Regulation Bill; and (b) what the potentially far-reaching implications thereof will be for the regulation of communal agricultural land.[195]

The objective of the Regulation Bill is to acquire "redistribution land" and to eventually redistribute such land.[196] To this end "redistribution land" is critical and is defined as being

[193] Clause 1 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[194] Pienaar (2017) *JQR* 2. See Chapter 2, 3 above.
[195] In this regard, it is unclear if and how the Regulation Bill and the Department of Rural Development and Land Reform, *Communal Land Tenure Policy* (23-24 August 2013) ("CLTP") would function together. Accordingly, the implications of the CLTP should be considered. The CLTP seeks to reform communal tenure to ensure security of land rights and production relations for people residing in communal areas. To achieve this, the policy envisions institutionalised use rights, which shall be administered either by traditional councils in areas that observe customary law, CPAs or trusts outside of these areas. This is also illustrated by the "wagon wheel" diagramme in the CLTP: The first wagon wheel envisaged by the CLTP, proposes to transfer the "inner boundaries" of communal land that observe customary laws to traditional councils. Once a traditional council is in possession of the title, ownership will vest exclusively in the traditional council (a product of the Traditional Leadership and Governance Act 41 of 2003) – thereby pre-empting others from making decisions about the land. While traditional councils will get title deeds of these communal areas, the individuals and families will get "institutionalised use rights" to parts of the land within them. In this regard, the new policy is similar to the provisions of CLARA, which proposed that traditional councils should have ownership of and power over communal land. In theory, the second wagon wheel provides for CPAs or trusts to own land titles. However, the new CLTP states that no new CPAs will be established in areas where traditional councils already exist – that is, most of the former Bantustans. In other words, the CLTP reserves communal land for control by the traditional councils while CPAs and other structures are expected to operate only outside of traditional communal areas. See Department of Rural Development and Land Reform, *Communal Land Tenure Policy* (23-24 August 2013) 13, 17-20, 22 in this regard. If the communal areas are owned by a traditional council or CPA, it is unclear whether it would form part of public agricultural land as determined by the bill and whether the communal land will be subject to the regulation of the bill. Furthermore it is unclear if or how the bill may impact the tenure security of the people living in communal areas. To fully understand the CLTP, one must read it together with the Department of Rural Development and Land Reform, *Rural Development Framework Policy* (24 July 2013) and the Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013). Importantly, see Pienaar "Customary law and communal property in South Africa: Challenges and Opportunities" in *Legal strategies for the development and protection of communal property* 142-149 where the author explores the functional relationship between the Traditional Courts Bill GN 901 *GG* 34850 12-12-2011 and the CLTP. For one, the envisioned outcomes of the CLTP shall advance key outcomes envisaged by the RDF, which include amongst others, decongestion of communal spaces; gender equity in land governance structures and tenure rights and household food and nutrition security. Furthermore, and in particular, the *State Land Lease and Disposal Policy* applies to most of the same land as the CLTP. See Pienaar *Land Reform* 255-258. Importantly, see recent developments, in particular the publication of the Communal Land Tenure Bill [B-2017] in GN 510 *GG* 40965 of 07-07-2017 which aims to regulate communal land.
[196] Read definition of "redistribution land" together with clause 2 of the Regulation of Agricultural Land Holdings Bill.

"all agricultural land that falls between or exceeds any category of agricultural holdings contemplated in section 25"[197] of the Regulation Bill. Accordingly, "redistribution land" is regarded as surplus agricultural land, namely agricultural land which falls above the proposed ceiling limit.

Clause 2 sets out the objectives of the Regulation Bill, namely to acquire agricultural land for redistribution; to redress past imbalances in access to agricultural land; to promote food security; to provide a transparent and more conducive regulatory framework and utilising policy-relevant information on agricultural land ownership and usage; to provide certainty regarding ownership of public and private agricultural land; and to enable the State to effectively deliberate on land matters and matters related to natural resource economics, the property market and the extent of land use to meet the policy and legislative intent of the State.[198]

Clause 3 of the Regulation Bill sets out the parameters for the operation or application of the Bill. As mentioned, the Regulation Bill is applicable to all agricultural land in South Africa. The operation or application of the Regulation Bill impacts all transactions whereby agricultural land is acquired or disposed of.[199] To the extent that a transaction intends to exclude, limit or avoid the provisions of the Bill, such clause or provision in said transaction is void.[200]

Furthermore, in the event that there is a conflict between the provisions of the Regulation Bill and any other law relating to the acquisition and disposal of agricultural land, the Regulation Bill expressly provides that it will trump any other law.[201]

3 3 3 1 2 Chapter 2: The Land Commission

At an overarching level the Regulation Bill provides for the establishment of a Land Commission;[202] consisting of a chairperson and at least five, but not more than nine members,[203] appointed for their knowledge of or experience in land-related matters.[204] The Land Commission will be an autonomous body accountable to the Minister of Agriculture,

[197] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[198] Clause 2 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[199] Clause 3(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[200] Clause 3(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[201] Clause 3(3) of the Regulation of Agricultural Land Holdings Bill. See Chapter 2, 4 above.
[202] Clause 4 of the Regulation of Agricultural Land Holdings Bill: Pienaar (2017) *JQR* 2.
[203] Clause 5(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[204] Clause 5(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.

Land Reform and Rural Development (previously the Minister of Rural Development and Land Reform). The Land Commission shall serve as the principal body to oversee the collection and dissemination of all information regarding public and private agricultural land[205] and will consequently develop and maintain a register of agricultural land holdings in order to monitor the distribution and redistribution of agricultural land.[206] This will, in principle, enable the government to monitor and evaluate its compliance with the constitutional directive to ensure land, tenure and related reforms.[207] The Land Commission will also advise the Minister.[208] Linked to these functions, the powers of the Commission and responsibilities of the Chairperson are set out respectively.[209] In order for the Commission to be effective, it has the following powers, "to determine its own staff establishment, collect and disseminate information, determine its own proceedings regarding meetings etc; and deal with matters incidental to its main functions".[210] Apart from the power to appoint members of the Commission and to make regulations, all other powers may be delegated to the Director-General of the Department of Agriculture, Land Reform and Rural Development by the Minister.[211]

3 3 3 1 3 Chapter 3: The register of agricultural land

The register of agricultural land holdings is pivotal to the effective operation of the Regulation Bill.[212] In this regard, Pienaar provides that the Land Commission has a twofold task: Firstly, it must *establish* a register in the prescribed format, in which all disclosure notifications in respect of private agricultural land holdings and information in respect of public agricultural land holdings must be recorded.[213] Secondly, the Commission must *maintain* (or update the disclosures and information) on an ongoing basis, in respect of private and public agricultural land.[214] The register may be maintained wholly or partly (a) on paper or on microfilm, or in any other medium; and (b) in a device for storing or processing information.[215]

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[205] Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill 37.
[206] See clause 8 of the Regulation of Agricultural Land Holdings Bill where the functions of the Land Commission are set out.
[207] Clause 2 of the Regulation of Agricultural Land Holdings Bill.
[208] Clause 8 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[209] Clauses 9 and 10 of the Regulation of Agricultural Land Holdings Bill.
[210] Pienaar (2017) *JQR* 2.
[211] Clause 9 of the Regulation of Agricultural Land Holdings Bill.
[212] Pienaar (2017) *JQR* 2.
[213] 2.
[214] Clause 12 (1)(a) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[215] Clause 12(2) of the Regulation of Agricultural Land Holdings Bill in. In terms of section 2 of the Electronic Deeds Registration Act 19 of 2019, the Chief Registrar must establish, develop and maintain the electronic

The underlying idea of establishing and maintaining an agricultural land register is to:

> "…provide full details regarding the extent of agricultural land, whether it is privately owned or public; and with regard to the former – to whom it belongs and with regard to the latter, the level of state ownership. As the register has to be established from scratch, all the necessary information has to be collected and then recorded. After the initial reflections in the register subsequent to the commencement of the Act, the register has to be maintained. This means that all transactions, the acquisition as well as the disposal of agricultural land, are thereafter recorded and reflected in the register. In a sense the process of compiling the register is thus ongoing and never-ending".[216]

Furthermore, if any errors were incurred during this recordal process, it can then be rectified in terms of Regulation Bill.[217] The rectification of errors can occur either on application to the Land Commission or *mero motu* by the Commission.[218] A prescribed fee may be paid to obtain access to the information in the register,[219] which includes statistical data (if available) from the information in the register.[220]

3 3 3 1 4 Chapter 4: Disclosures in respect of private agricultural land

Chapter 4 deals with specific disclosures in respect of private agricultural land. The Regulation Bill states that all private owners of agricultural land must, within 12 months after the commencement of the Regulation Bill, lodge duly completed notifications of ownership in the prescribed manner to the Land Commission.[221] The notification or disclosure must include information pertaining to: the race, gender and nationality of the "owner"; the size and use of the land holding; any real right registered against and licence allocated to the parcel of land; and any other information as may be prescribed.[222]

The State, as the owner of all public agricultural land and any statutory bodies, are exempted from the requirement to disclose information regarding its race, gender and nationality of the

deeds system. Accordingly, if the Land Commission under the Regulation Bill elects to use an electronic register, there must be a clear correlation with these recent deeds and registries developments.
[216] Pienaar (2017) *JQR* 2.
[217] Clause 13 of the Regulation of Agricultural Land Holdings Bill.
[218] Clauses 13 (1) and (2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 2.
[219] Clause 14 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[220] Clause 14(1)(c) of the Regulation of Agricultural Land Holdings Bill.
[221] Clause 15 of the Regulation of Agricultural Land Holdings Bill.
[222] Clause 15(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.

owner to the Land Commission.[223] Likewise, the information pertaining to race and gender is not required where the owner is a foreign person.[224]

In this regard Pienaar explains that:

> "In other words, an overarching distinction is drawn between private and public agricultural land and, with respect to private agricultural land, a further distinction is made between citizen owners and foreign persons. Depending on the particular category of land, less or more information is thus required and reflected".[225]

Once the register is established, it also has to be maintained. In this regard, subsequent transactions have to be reflected in it as well.[226] Accordingly, every person who acquires ownership of private agricultural land must, within 90 days from the date of acquisition of the agricultural land, lodge a duly completed notification of ownership.[227] The same information that is needed to establish the register, is required.[228] Importantly, the registrar is prohibited from issuing a deed of transfer in respect of agricultural land holdings before the notification of ownership, and all the necessary information, have been lodged with the registrar.[229] The registrar must then, within 30 days of the registration of agricultural land holding, provide the Land Commission with a copy of the notification of ownership.[230] By way of example, the process is thus as follows: The purchaser and the seller enter into an agreement with respect to agricultural land. Once ownership has been acquired, a duly completed notification is submitted to the registrar within 90 days of acquisition. Ownership of immovable property, thus agricultural land, only passes on registration in the deeds office.[231] At the same time, however, the Regulation Bill provides that the registrar may not execute a deed of transfer unless the notification has been lodged with the registrar. [232] Pienaar raises the question how this process is going to unfold.[233] She explains that the process is unclear, because it

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[223] Clause 15(3) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[224] Clause 15(4) of the Regulation of Agricultural Land Holdings Bill.
[225] Pienaar (2017) *JQR* 3.
[226] 3.
[227] Clause 16 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[228] Clauses 15(2) and 16(1)(b) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[229] Clause 16(2) of the Regulation of Agricultural Land Holdings Bill.
[230] Clause 16(3) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[231] Pienaar (2017) *JQR* 3. See Van der Walt & Pienaar *Introduction to the Law of Property* 154-161; Badenhorst, Pienaar & Mostert *The Law of Property* 206-239 and Mostert & Pope (eds) *The Principles of The Law of Property* 191, 211-214 dealing with the requirements for a valid transfer of ownership for immovable property. A valid transfer of ownership for immovable property requires a valid real agreement and registration in the Deeds Registry. See also section 16 of the Deeds Registries Act 47 of 1937.
[232] Clause 16(2) of the Regulation of Agricultural Land Holdings Bill.
[233] Pienaar (2017) *JQR* 3. See Van der Walt & Pienaar *Introduction to the Law of Property* 154-161; Badenhorst, Pienaar & Mostert *The Law of Property* 206-239 and Mostert & Pope (eds) *The Principles of The Law of Property* 191, 211-214.

seems as if this clause ignores the fact that ownership of immovable property is only acquired by way of registration, a derivative form of acquisition.[234]

3 3 3 1 5 Chapter 5: Public agricultural land

Chapter 5 regulates public agricultural land holdings. In this regard, it is required that someone or an institution has to lodge the necessary notifications. The accounting officer of the relevant department, public entity, municipality or municipal entity is responsible for the administration of the land holding and is thus required to submit the necessary information to the Land Commission.[235] Here a set period of time is not provided, but the Regulation Bill merely states "within such period or periods as determined by the Commission".[236] Therefore, where public agricultural land is concerned, various periods enter into the picture. "Not only are these time periods not the same as when private land is concerned, it is also quite possible that different time periods exist among public entities as well".[237] The information pertaining to public agricultural land holdings is likewise collected, recorded and maintained in the register.[238] As explained, the register is thus a "fluid concept, constantly being amended and updated".[239] In essence, establishing and maintaining the register is thus a complex, multi-dimensional task.[240]

3 3 3 1 6 Chapter 6: Prohibition on acquisition of and regulation of lease and disposal of agricultural land: Foreign persons

Chapter 6 provides for the prohibition on acquisition of agricultural land by "foreign persons".[241] It also provides for the regulation of lease and disposal of agricultural land by foreign persons. Restrictions on foreigners acquiring agricultural land are discussed as a separate mechanism for the regulation of agricultural land in South Africa below.[242]

[234] Pienaar (2017) *JQR* 3.
[235] Clause 17(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[236] Clause 17(2)(b) of the Regulation of Agricultural Land Holdings Bill.
[237] Pienaar (2017) *JQR* 3.
[238] 3.
[239] 3.
[240] 3.
[241] Chapter 6 of the Regulation of Agricultural Land Holdings Bill.
[242] See 3 4 below.

3 3 3 1 7 Chapter 7: Categories of ceilings for agricultural land holdings

Chapter 7 provides for the categories of ceilings for agricultural land holdings. The provisions relating to determining the land ceilings are challenging.[243] Initially, as mentioned, land ownership of South Africans (both natural and legal persons) would be curbed in that ownership would be restricted to 12 000 hectare (ha) or two farms.[244] While it is unclear how the ceiling of 12 000 ha was established in the first place, the previous Minister of Rural Development and Land Reform announced the different land sizes on 8 May 2015,[245] comprising: (a) large scale farms in terms of which the ceiling for a large viable commercial farm shall be 5000 ha; (b) medium scale farms constituting 2500 ha; and (c) small scale farms amounting to 1000 ha.[246] There was no clear basis for the different categories and the corresponding restricted land sizes. Furthermore, the Minister held that:

> "Any excess land portions between each of these categories – small scale and medium scale; medium scale and large scale; and, above the 12 000 ha maximum, shall be expropriated and redistributed; and compensation will be on the basis of the 'just and equitable' principle enshrined in section 25(3) of the Constitution".[247]

The use of expropriation and the determination of compensation under section 25(3) in this context is not problematic *per se*.[248] However, the fact that *excess land* between the various categories outlined above will be expropriated can become rather problematic,[249] depending on particular circumstances. In accordance with the categories set out above, this would mean that an agricultural landholding constituting for example 1750 ha, would automatically be reduced to 1000 ha to fit into the brackets provided, irrespective of *actual utilisation* of the excess land. Another example would be where a land owner owns a farm just below the 2500 ha ceiling. In such a case, the farmer would be forced to reduce his or her farm size to

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[243] Pienaar (2017) *JQR* 3.
[244] See 3 3 2 3 above. Anon "ANC calls for faster land reform" (29-01-2015) *Fin24* < http://www.fin24.com/Economy/ANC-calls-for-faster-land-reform-2015-01-29> (accessed 09-04-2018); Hunter "ANC wants land cap of 12 000 hectares or two farms" (28-01-2016) *Mail and Guardian* 17; Mabuza, Strydom & Dlamini "Land offensive" (29-01-2015) *Time Live* <http://www.timeslive.co.za/thetimes/2015/01/29/land-offensive> (accessed 9-04-2018). See also Department of Rural Development and Land Reform, *2015/2016 financial year, budget policy speech* 8 May 2015. In this regard see Donnelly "Bitter fight looms over land'" (14-05-2015) <http://mg.co.za/article/2015-05-14-bitter-fight-looms-over-land/> (accessed 09-04-2018).
[245] Department of Rural Development and Land Reform, *2015/2016 financial year, budget policy speech* 8 May 2015; Pienaar (2015) *JQR* 1.
[246] Department of Rural Development and Land reform, *2015/2016 financial year, budget policy speech* 8 May 2015 7; Pienaar (2015) *JQR* 1.
[247] Department of Rural Development and Land reform, *2015/2016 financial year, budget policy speech* 8 May 2015 7.
[248] Pienaar (2015) *JQR* 1.
[249] 1.

no more than 1000 ha as required by the prescribed categories of land. Apart from the fact that the brackets seem rather superficial and arbitrary, it may be extremely difficult or even impossible to manage the entire process and re-utilise the land effectively.[250] The whole system would furthermore have to be managed and monitored very carefully. Farming enterprises may also have to be reconsidered in principle and reconstituted. At this stage of the development, it was unclear and worrisome how the various unique farming needs, demands, and enterprises could be accommodated within this "three category" approach.[251] In essence, diverse agricultural conditions, climatic factors and particular agricultural requirements were seemingly overlooked before the publication of the Regulation Bill, thereby envisaging a "one size fits all" approach.

Interestingly, the wording of the 2017 Regulation Bill in relation to the determination of agricultural land ceilings is very clear: Different categories of land ceilings may be determined for different districts and regions.[252] While the point of departure is thus that various regions and areas will be approached differently, there was still no certainty regarding precise ceilings in the Regulation Bill itself. Exact ceilings for each district are to be announced by notice in the *Government Gazette*, by the Minister, after consultation.[253] The Minister has the discretion to determine special categories of ceilings and may also provide for exemptions of particular categories of land holdings from the operation of the Regulation Bill.[254] For the determination of ceilings for agricultural land holdings for each district regard must be had to "such criteria and factors as may be prescribed."[255] The following criteria and factors are listed: (a) land capability factors (essentially high, medium or unique agricultural land, matters pertaining to production output, variations in physical potential in terms of soil type, and the relationship between resources); (b) capital requirements of different enterprises; (c) measure of expected household and agro-enterprise income; (d) annual turnover; (e) relationship between product prices and price margins; and (f) any other matter as may be prescribed.[256] Furthermore, the Minister is obligated to publish a draft of the proposed determination by notice in the *Gazette* and in the media circulating nationally and in the relevant district,

[250] Pienaar (2015) *JQR* 1.
[251] 1.
[252] Clause 25(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[253] Clause 25(1) of the Regulation of Agricultural Land Holdings Bill.
[254] Clause 25(1)(c) of the Regulation of Agricultural Land Holdings Bill.
[255] Clause 25 (2) of the Regulation of Agricultural Land Holdings Bill.
[256] Clause 25 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.

calling on interested persons to comment on the draft, in writing, no less than 30 days from the date of publication of the notice, before making a determination.[257]

3 3 3 1 8 Chapter 8: Redistribution agricultural land

Chapter 8 forms a key part of the envisaged goals of the Regulation Bill. It deals with "redistribution agricultural land".[258] As mentioned, "redistribution agricultural land" encapsulates the various parcels of agricultural land that are regarded as surplus land falling above the ceiling limit.[259]

As explained, the owner is required to disclose the necessary information to the Land Commission, including the identity of the parcel of agricultural land that amounts to "redistribution agricultural land" in terms of the Regulation Bill.[260] However, the owner can only make the necessary disclosures once the ceilings for the particular district have already been determined and finalised.[261] Depending on the district or area, the size of the specific "redistribution agricultural land" will differ.[262] In this regard, Pienaar explains that the land parcels will not only be different in size, depending on the particular ceilings in specific districts, "but the exact identification of the specific portion of land may be quite challenging".[263] She clarifies further that:

> "That is the case because, where immovable property is concerned, land and parcels of land are identified by way of deeds and registry information, essentially reflected in title deeds. Where the land exceeds the ceiling provided, it will probably form part of a larger existing parcel of land, identified in the title deed, possibly a (large) farm. There is no separate deed for the part or parts that exceed the ceiling as such. Nevertheless, such identification has to take place".[264]

Pienaar recommends that it may be worthwhile for the Minister to issue regulations or guidelines as to how such excess portions of land are to be identified or described for purposes of the register and the work of the Land Commission.[265]

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[257] Clause 25(3) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[258] Clauses 1 and 26, read with clause 15 of the Regulation of Agricultural Land Holdings Bill
[259] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[260] Clause 26(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[261] Pienaar (2017) *JQR* 3.
[262] 3.
[263] 3.
[264] 3.
[265] 3.

Immediately following the duty to identify ceiling-surplus land, "redistribution agricultural land", the next sub-clause provides that "Black" persons, must be offered the right of first refusal in respect of "redistribution agricultural land" within a prescribed period in the prescribed manner.[266] Pienaar highlights that there is "a gap between identifying the redistribution [agricultural] land on the one hand and offering it to Black persons, on the other".[267] She questions how the land is to be offered and proposes that the land would first have to be subdivided and separated from the rest of the land (the larger farm) that falls within the ceilings or brackets.[268] The Regulation Bill does not however provide for a Schedule of repealed legislation, which means that SALA is still in operation.[269] It is unclear whether or how SALA will apply in conjunction with the Regulation Bill.[270] If SALA applies, it means that a specific process, under SALA, would have to be followed prior to the land being offered for sale.[271] The agricultural land in question, in accordance with the provisions of SALA, would have to be surveyed and subdivided with the consent of the Minister.[272] Thereafter a corresponding title deed has to be provided. Pienaar notes further that it is "unclear what the "prescribed manner" means with reference to offering the land for sale to Black persons".[273] She questions whether the Minister or land owner will take responsibility for the alienation of the agricultural land and everything linked thereto.[274] It is also questioned whether the sale will occur on the open market and who or how the acquisition process will be monitored.[275]

The interaction between the Regulation Bill and Act 126 complements one another at an overarching level. The implementation of land ceilings may effectively result in the subdivision of agricultural land for redistribution purposes, which Act 126 in any event allows.

Furthermore, there may be cases where no Black person acquires the land. In such cases, the Regulation Bill provides that the Minister shall acquire the land, within the prescribed period.[276] However, the Regulation Bill does not provide for cases where the Minister does not want to or cannot acquire the redistribution agricultural land.[277] For example, the Minister

[266] Clause 26(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[267] Pienaar (2017) *JQR* 3.
[268] 3.
[269] 3-4.
[270] 4.
[271] 3-4.
[272] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970; Pienaar (2017) *JQR* 4.
[273] Pienaar (2017) *JQR* 4,
[274] 4.
[275] 4.
[276] Clause 26(2)(b) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 4.
[277] Pienaar (2017) *JQR* 4.

may not want to acquire the land, because the land does not meet specific developmental or planning objectives.[278] If the Minister and the current land owner are unable to reach an agreement regarding the purchase price, the Minister may, subject to relevant legislation, expropriate the redistribution land in question.[279]

Again, various questions arise as to how the transfer of ownership is to be reflected in the register.[280] For example, when the land is purchased by the Minister for redistribution purposes, is the land regarded as private or public agricultural land? When land is expropriated, ownership vests in the State.[281] However, it is unclear whether this land automatically qualifies as public agricultural land, to be reflected in that part of the land register. Furthermore, it is unclear what the implications are of noting that the land is "public agricultural land".[282]

Where there is disagreement between the land owner and the Minister about the identification of the agricultural land, the issue can be referred to arbitration under the Arbitration Act 42 of 1965.[283]

The Minister may also be approached for exemptions from the ceiling limits.[284] For example, "Institutional Funds that own agricultural land holdings portions of which constitute redistribution agricultural land in terms of the provisions of this Act, may apply to the Minister for exemption…".[285]

3 3 3 1 9 Chapter 9: Administrative and other matters

Administrative and other related matters, *inter alia* investigations undertaken by the Land Commission[286] and appointing a Chief Operations Officer, are dealt with in Chapter 9.[287] The Chief Operations Officer is appointed to assist the chairperson of the Land

[278] Pienaar (2017) *JQR* 4.
[279] Clause 26(2)(c) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 4.
[280] Pienaar (2017) *JQR* 4.
[281] *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) para 48. However, see EJ Marais "When does state interference with property (now) amount to expropriation: An analysis of the *Agri SA* court's state acquisition requirement (part 1)" (2015) 18 *Potchefstroom Electronic Law Journal* 2982-3031; EJ Marais "When does state interference with property (now) amount to expropriation: An analysis of the *Agri SA* court's state acquisition requirement (part 2)" (2015) 18 *Potchefstroom Electronic Law Journal* 3032-3061.
[282] Pienaar (2017) *JQR* 4.
[283] Pienaar (2017) *JQR* 4; clause 26(3)(c) of the Regulation of Agricultural Land Holdings Bill.
[284] Clause 26(4)(a) of the Regulation of Agricultural Land Holdings Bill.
[285] Pienaar (2017) *JQR* 4.
[286] Clause 27 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 4.
[287] Clause 28 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 4.

Commission in discharging his or her responsibilities.[288] The funds of the Land Commission are to be appropriated by Parliament and/or received from any other source through the National Revenue Fund.[289] The Land Commission's financial statements have to be audited annually.[290]

No transaction dealing with the acquisition or disposal of agricultural land may be in contravention of the Regulation Bill. Any acquisition of land in any manner which is inconsistent with or contrary to the provisions of the Regulation Bill, is unlawful and a court may make an order for the forfeiture of such land to the State.[291] Pienaar highlights that this is a drastic provision, which begs the question whether there should not first be a possibility to rectify or otherwise address transgressions.[292] She further suggests that:

> "In any event, it is thus imperative that everyone – current and future land owners – is informed of the new measures, how they function and their implications. This means that any change in land ownership, including as a result of testate or intestate succession, has to conform to the Act [the Regulation Bill] as well."[293]

In this regard the Regulation Bill provides for manuals, guidelines and rules to be drafted regarding the administrative nature of the Land Commission's work.[294] While necessary and useful, it is questionable whether this will be sufficient to inform all role players.[295]

Furthermore, any person who fails to lodge duly completed notifications or disclosures is guilty of an offence and liable on conviction to a fine or to imprisonment.[296] Likewise, the provision of false information or failure to appear before the Land Commission when called onto to do so also constitutes offences.[297]

The Minister may issue regulations in relation to a long list of items.[298] As mentioned, while the Regulation Bill has some general points of departure, much of the detail still needs to be

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[288] Pienaar (2017) *JQR* 4.
[289] Clauses 29(1)(a) and (b) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 4.
[290] Clause 30 of the Regulation of Agricultural Land Holdings Bill.
[291] Pienaar (2017) *JQR* 4; clause 35 of the Regulation of Agricultural Land Holdings Bill.
[292] Pienaar (2017) *JQR* 4.
[293] Pienaar (2017) *JQR* 4.
[294] Clause 33 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 4.
[295] Pienaar (2017) *JQR* 4.
[296] Clause 36(1) of the Regulation of Agricultural Land Holdings Bill.
[297] Clause 36(2) of the Regulation of Agricultural Land Holdings Bill.
[298] Clause 37 of the Regulation of Agricultural Land Holdings Bill.

finalised and made public by way of regulations.[299] Before any regulation may be published, the Minister has to publish a draft regulation or any amendment or repeal thereof, by notice in the *Government Gazette*, calling on all interested persons to comment in writing, within 30 days of the publication.[300] However, when the Minister alters the draft regulations as a result of the above, those alterations do not have to be published again before making the regulations.[301]

3 3 3 2 Reflection: Concerns and Challenges

There is little clarity regarding the specifics for the implementation of the Regulation Bill. A number of concerns, challenges and possible pitfalls arise when analysing the Regulation Bill, set out forthwith.

3 3 3 2 1 Administrative capabilities and costs

The development of an effective land administration system[302] is challenging. It requires financial resources and trained personnel, both of which are in short supply in South Africa.[303] Whether the Land Commission will have the technical ability to administer such a registry sufficiently and accurately remains to be seen. The creation of the registry will be a monumental task equivalent to trying to recreate a significant portion of the existing Deeds Registry, while updating the registry continuously and simultaneously. The reason for this seems twofold: (a) to determine how much agricultural land the State, private individuals and foreigners own; and (b) to determine the characterisation of privately owned agricultural land by race, gender and nationality. In other words, the creation of the registry sets out how much land is owned, by whom and which land will be available for redistribution.

[299] These details include, the information that has to be reflected in the register contemplated in clause 12; the time the register has to be open for inspection; the format of and information to be contained in a notification or submission in terms of the Regulation Bill; the forms and information to be contained in the register in respect of public land as contemplated in clause 17 and, importantly, the criteria and factors that must be considered in the determination of the categories of ceilings of agricultural land holdings as contemplated in clause 25.
[300] Pienaar (2017) *JQR* 4; clause 37(2) of the Regulation of Agricultural Land Holdings Bill.
[301] Pienaar (2017) *JQR* 4.
[302] Land administration encompasses a set of systems and processes, including the registration system, administrative system (centralised or decentralised), surveying and valuation processes. However, it is not the aim of this dissertation to provide for a comprehensive critical analysis of the South African's land administration system. This dissertation is only concerned with aspects of the land administration system which may contribute to effective redistribution. See also G Pienaar "Aspects of land administration in the context of good governance" (2009) 12 *Potchefstroom Electronic Law Journal* 15-55.
[303] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 5, 41, 45-46, 76-80.

Interestingly, while there is no accurate data on foreign ownership of agricultural land in South Africa, the Memorandum to the Regulation Bill states that foreign ownership of agricultural land has increased substantially in recent years.

The envisaged creation of the Land Commission also raises fundamental fiscal concerns regarding the extent to which the Office will be capacitated with adequate financial and human resources, in order to discharge its mandate to create and maintain the registry.[304] The expected cost set out in the Memorandum to the Regulation Bill provides for R21.3 million per annum "for the operation of the Land Commission as well as the acquisition of agricultural land".[305] However, the next sentence contradicts this statement: "This excludes the cost of acquisition of redistribution agricultural land".[306] An amount of R21.3 million per year seems like a minuscule and inadequate amount for acquiring agricultural land, while R1.2 billion is currently budgeted for Land Reform.[307]

3 3 3 2 2 The redistribution process

The preparation of the register is presumably the first step in the envisaged forced redistribution process, set out by the Regulation Bill. The second step would be to impose ceilings and then determine which land falls within the definition of "redistribution agricultural land". Once it is determined that a parcel of land is "redistribution agricultural land", Black persons, as defined,[308] must be offered the right of first refusal in respect of redistribution land.[309] As mentioned above, if Black persons fail to exercise their right of first refusal, the redistribution agricultural land must be acquired by the State through market-led approaches or expropriation.[310]

What happens to the redistribution agricultural land after it has been acquired by the State is not dealt with in the Regulation Bill. Presumably, the State will acquire the land with a view to ultimately allocate the agricultural land to land reform beneficiaries. However, the precise definition of beneficiaries or an indication of how the beneficiaries will be determined is

[304] These costs should also be seen within the context of other recent developments such as the establishment of the Office of the Valuer-General and the recent judgment in *Mwelase v Director-General for the Department of Rural Development and Land Reform* (CCT 232/18) [2019] ZACC 30 (20 August 2019) in terms of which the installation of a Special Master for Land Reform (Labour Tenants) is confirmed.
[305] Memorandum of the Regulation of Agricultural Land Holdings Bill 42.
[306] Memorandum of the Regulation of Agricultural Land Holdings Bill 42.
[307] National Treasury, *2017 Budget Review* 66.
[308] As defined in the Employment Equity Act 55 of 1998, essentially being Indian, African and Coloured citizens.
[309] Clause 26(2) of the Regulation of Agricultural Land Holdings Bill.
[310] See Chapter 5 below dealing with the approaches for acquiring agricultural land in South Africa.

lacking. Another concern is that many Black people may not be able to exercise their right of first refusal. Arguably, only the wealthier sector of Black population would have the resources to obtain the agricultural land. However, the Regulation Bill does not contain any provisions dealing with the provision of financial assistance to Black people wishing to acquire the "redistribution agricultural land" under the Regulation Bill. These provisions are set out in different policies, discussed in Chapter 6. This means that most redistribution agricultural land is likely to be acquired by the State.

Furthermore, having acquired the bulk of all redistribution agricultural land, the Minister is also unlikely to transfer any of it into the *ownership* of emergent Black farmers as this would conflict with the *State Land Lease and Disposal Policy* ("SLLDP") of 2013. Under this Policy,[311] emergent Black farmers that are settled on land acquired by the State for redistribution purposes are confined to leasehold tenure and cannot easily obtain individual title. In terms of this Policy small Black subsistence farmers are expected to remain perpetual tenants of the government.[312] Bigger farmers with the capacity for commercial production must lease their farms for 30 years, and thereafter for another two decades.[313] The farmers only have the option to purchase the farm at a market related price after 50 years. [314] The lessee's right to exercise the option to purchase is depended on numerous factors such as whether the "farmer consents to the State's rights of first refusal being registered against the title deep",[315] whether the farmer has expanded or maintained the production of the land or whether he or she has adhered to the lease agreement.[316] In this regard, the Regulation Bill and SLLDP may not assist in redistributing land to Black people in any meaningful sense and may bring about creeping land nationalisation.[317] In the interim, their leases may be terminated at any time for what the SLLDP describes as a lack of "production discipline".[318]

[311] See Chapter 5, 2 4 2 below.
[312] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013) 12-21.
[313] 12-21.
[314] 25-26.
[315] 25-26.
[316] 25-26.
[317] See Chapter 5, 2 4 2.
[318] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013) 25; R Hall "What's wrong with government's state land lease & disposal policy, and how can it be remedied?" Institute for Poverty, Land, and Agrarian Studies, PLAAS Position for National Land Tenure Summit, 2014: State Land Lease and Disposal Policy, 8 September 2014.

3 3 3 2 3 Disclosures of private agricultural land

Private agricultural land owners are required to submit a disclosure of present ownership within 12 months of the Regulation Bill coming into operation. Concern is raised in respect of those persons who acquire ownership of a parcel of agricultural land right before the end of the submission date. It is unclear whether those owners will be penalised for not submitting within the time frame provided.

3 3 3 2 4 Implications of the imposition of ceilings on agricultural land

By imposing ceilings, the State may end up with a myriad of off cuts from existing farms spread across the region, which may lead to the fragmentation of prime agricultural land (contradictory to the legitimate purpose of SALA).[319] Furthermore, the Regulation Bill does not set out how the State will determine which part of the farm to "cut off" if the land holding falls above the ceiling imposed. Importantly, there is no guarantee that the off cuts will have suitable soil, access to water, access to roads or to municipal services, all of which are crucial factors in case the beneficiary were to be an aspirant farmer. In other words, while the parcel of land that does not fall outside the scope of ceiling may be an economically viable unit, there is no guarantee that the land deemed to be surplus or redistribution agricultural land will be a viable unit in its own right. If the off cuts created by the Bill are relatively small, the beneficiary will either have to consolidate various portions or, if that is not viable, be expected to compete in a globalised economy but denied the opportunity to benefit from economies of scale.

Redistributing land with the inherent promise of running a viable farm without giving emerging farmers the skills and capital to do so, sets up the new owners for inevitable failure.[320] While the Regulation Bill does not provide for financial and post-settlement support, various policies discussed in Chapter 5 may provide assistance in this regard.[321] Failed farms mean that food security is at risk with dire implications for society as a whole,

[319] Frantz *Repealing the Subdivision of Agricultural Land Act* 158-159.
[320] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 73-75; H van der Elst *Post-settlement land reform objectives in South Africa: towards a management model for sustainable development*, PhD University of North-West (2014); NS Masoka & H van der Elst "Post-settlement support as a contributor to the success of the South African Land Reform programme (1994-1997)" (2014) 26 *Politeia: South African Journal for Political Science and Public Administration* 290-298; and HP Binswanger-Mkhize "From failure to success in South African land reform" (2014) 9 *African Journal of Agricultural and Resource Economics* 253-269.
[321] See Chapter 5, 2 3 – 2 5 below.

especially for the poor.[322] It is thus possible that the process may give rise to the exact same problems as those experienced following previous land reform attempts,[323] including a lack of training and support programmes; lack of access to capital and insufficient and unsustainable use of land.[324] Synergy between the financial and post-settlement support policies and the Regulation Bill is therefore required.

Furthermore, the determination of specific land ceilings per district constitutes a complex bureaucratic operation that includes the gathering of information in relation to all of the factors set out for the different categories of ceilings. In this regard, the Regulation Bill overlooks the degree of expertise that will be needed in evaluating all the data, some of which may fluctuate daily, such as product prices. Gathering all the relevant information is only the start. The information must also be verified, sifted and analysed. Some of the variables will also be difficult to assess. For example, the availability of water will depend on rainfall, availability of dams, the use of irrigation systems and the relevant provisions of the post-1994 water dispensation.[325] Overall it amounts to an enormously difficult and time-consuming task, often requiring high levels of expertise.

[322] See Department of Agriculture, Forestry and Fisheries, *Agricultural productivity in South Africa: Literature review* (March 2011) 1-29, 9; SG Mahule *Exploration of contributing factors leading to a decrease in agricultural productivity in restituted farms of Ehlanzeni District Mpumalanga Province* Master's thesis, Stellenbosch University (2015); BK Abrha *Factors affecting agricultural production in Tigray Region, Northern Ethiopia* DPhil thesis, University of South Africa (2015); B Sultan "Global warming threatens agricultural productivity in Africa and South Asia" (2012) 7 *Environmental Research Letters* 1-3; APA Vink *Land Use in Advancing Agriculture* (1975); DB Lobell, W Schlenker & J Costa-Roberts "Climate trends and global crop production since 1980" (2011) 333 *Science* 616-620 and T Folnovic *"*Factors that affect agricultural productivity*"* (11-03-2015) *Agrivi* <https://www.blog.agrivi.com/post/factors-that-affect-agricultural-productivity> (accessed 17-06-2017).

[323] See for example, *Mwelase v Director-General for the Department of Rural Development and Land Reform* (CCT 232/18) [2019] ZACC 30 (20 August 2019). This case concerned the failure by the Department of Rural Development and Land Reform (Department) to process land tenant applications submitted in terms of the Land Reform (Labour Tenants) Act 3 of 1996. Because of that failure, the Land Claims Court (LCC) ordered the appointment of a Special Master for labour tenants to assist the Department in its implementation of the Act. See also *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the court noted the State's continual failure to comply with constitutional impertatives. In particular, the State failed to convert the tenous land rights of a Black farmer, who was initially offered to purchase the land and become owner thereof in 2003 under the LRAD (see Chapter 5, 2 3 2 below) programme.

[324] Van der Elst *Post-settlement land reform objectives in South Africa: towards a management model for sustainable development*; Masoka & Van der Elst (2014) *Politeia: South African Journal for Political Science and Public Administration* 290-298; and Binswanger-Mkhize (2014) *African Journal of Agricultural and Resource Economics* 253-269.

[325] See the National Water Act 36 of 1998.

3 3 3 2 5 Cooperation with different departments or offices

Before the newly reconfigured national executive following the May 2019 elections,[326] which now provides for a Department of Agriculture, Land Reform and Rural Development ("DALRRD") (previously the Department of Agriculture, Forestry and Fisheries ("DAFF") and the Department of Rural Development and Land Reform ("DRDLR")), it was unclear how the DRDLR and the DAFF would function together. While SALA prohibits the subdivision of agricultural land, unless the written consent of the Minister of Agriculture, Forests and Fisheries was acquired, the implementation of land ceilings provided for in the Regulation Bill inherently results in the land being subdivided into smaller – even uneconomic – parcels. In this regard, the Regulation Bill provides that:

> "In the event of a conflict between the provisions of this Act and any other law relating to the acquisition and disposal of agricultural land, the provisions of this Act prevail".[327]

The imposition of land ceilings will be automatic and enjoy preference[328] and therefore, the land owner will not be required to apply for the subdivision of his or her agricultural land to the relevant Minister. However, if the Preservation Bill is promulgated it will repeal SALA. Like the Regulation Bill, the Preservation Bill provides that:

> "In the event of any conflict between a section of this Act and — (a) other national legislation, the section of this Act prevails if the conflict specifically concerns the management or development of agricultural land…".[329]

Arguably, the provisions dealing with the restrictions on the subdivision of agricultural land in the Preservation Bill[330] may concern the management and development of agricultural land.[331] In such cases, it is unclear whether the Regulation Bill or Preservation Bill will enjoy preference. Whether applications have to be lodged, in terms of the Preservation Bill, every time the imposition of a ceiling limit results in the subdivision of agricultural land, is unclear.

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[326] The Presidency "President Ramaphosa announces reconfigured department" *The Presidency The Republic of South Africa* <http://www.thepresidency.gov.za/press-statements/president-ramaphosa-announces-reconfigured-departments> (accessed 13-08-2019).
[327] Clause 3(3) of the Regulation of Agricultural Land Holdings Bill.
[328] Clause 3(3) of the Regulation of Agricultural Land Holdings Bill provides that: "In the event of a conflict between the provisions of this Act and any other law relating to the acquisition and disposal of agricultural land, the provisions of this Act prevail".
[329] Clause 4(1) of the Preservation and Development of Agricultural Land Bill.
[330] Clause 19 of the Preservation and Development of Agricultural Land Bill.
[331] Mostert & Pope (eds) *The Principles of the Law of Property* 149-152.

The imposition of land ceilings may further impact land-use planning schemes and the operation of SPLUMA, which fall under the jurisdiction of the DRDLR. In this regard, it will be necessary to determine the hierarchy where the Regulation Bill and other legislative measures, such as SALA and SPLUMA, are in conflict.

Although both the Land Commission and the Office of the Registrar of Deeds fall under the DRDLR, it is unclear how the redistribution process will be reconciled with South Africa's existing land registration process in terms of the Deeds Registries Act 47 of 1937.[332] No provision is made for the cooperation between the Office of the Land Commission and the Office of the Registrar of Deeds in the Regulation Bill in relation to the transfer of ownership. For example, there is no provision which either consolidates, apportions or divides the responsibilities of the members of the Land Commission and the Registrar of Deeds respectively. It is also questioned whether the register created by the Land Commission will replace the Deeds Registry wholly, partially or not at all, in light of the fact that the creation of the registry will recreate a significant portion of the existing Deeds Registry at least as far as agricultural land is concerned.

Furthermore, cooperation between the Office of the Land Commission and the Office of the Valuer-General[333] is required. Before land can be acquired for redistribution purposes under the Regulation Bill, the Valuer-General must provide for the valuation of the property in question.[334] Again, no provision is made for the cooperation between these two departmental offices in the Regulation Bill.

3 3 3 2 6 Constitutionality of land ceilings and restrictions on foreigners acquiring agricultural land

A further pertinent issue is whether the determination and implementation of land ceilings in the manner set out in the Bill is constitutional, given the requirements of section 25(1) and (2) of the Constitution.[335] As indicated above,[336] one of the overarching aims of the study is to analyse the constitutionality of these regulatory measures and mechanisms. While this

[332] The Deeds Registries Act 47 of 1937 regulates all aspects of the registration of deeds and the office and duties of the Registrar of Deeds.
[333] Chapter 2 of the Property Valuation Act 17 of 2014. See Chapter 5, 3 2 3 2 below where the role of the Valuer-General is discussed further.
[334] Section 6 of the Property Valuation Act 17 of 2014.
[335] Section 25(1) of the Constitution of the Republic of South Africa, 1996; *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 59.
[336] See Chapter 1 above.

Chapter sets out the legal position in terms of the Regulation Bill for the proposed land ceilings and restrictions on foreigners acquiring agricultural land,[337] the following Chapter aims to determine whether these mechanisms are constitutional.

3 4 Restrictions on foreigners acquiring and disposing of agricultural land

3 4 1 Introduction

The pre-constitutional era "institutionalised discriminatory and socially divisive and destructive agricultural…land use policies and management systems"[338] which undermined what would ordinarily be regarded as "democratic forms of government and citizenship".[339] At the start of the new constitutional dispensation, which is spearheaded by the abolishment of racially-based land control systems, South Africa followed an approach to land where access is possible, for all persons, in principle.[340] This system is characterised by an open, unlimited market, which is not prescriptive with respect to farm sizes or the amount of agricultural land one person or entity may own.[341] There have also been no restrictions on or conditions relating to how much land foreigners may own.[342] Essentially, access to land is unrestricted, but subject to the imperative set out in section 25(5) of the Constitution in that the State has a duty to take necessary steps to broaden access to land for citizens specifically.[343] In line with this duty, the State aims to broaden access to land for citizens by: (a) restricting the amount of agricultural land any person, citizen or foreigner, may own by way of land ceilings;[344] (b) restricting the disposal of agricultural land by foreigners;[345] and (c) restricting foreigners from acquiring ownership of agricultural land in future.[346] Land ceilings and the restrictions on the disposal of agricultural land affect the existing ownership entitlements of foreigner land owners. However, the restrictions in relation to acquiring agricultural land do not affect any ownership rights because such rights do not yet exist. While land ceilings have already been discussed above,[347] this section focuses on the latter two restrictions. Each restriction will be discussed in turn.

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[337] See 3 4 below.
[338] Van der Walt (2008) *Stell LR*, 325.
[339] Van der Walt (2008) *Stell LR* 325.
[340] Pienaar (2017) *JQR* 1. See also Pienaar *Land Reform* 276-280 for more background on global approaches to access to land.
[341] Pienaar *Land Reform* 370.
[342] 370.
[343] Pienaar (2017) *JQR* 2.
[344] See 3 3 above.
[345] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[346] Clauses 19 and 20 of the Regulation of Agricultural Land Holdings Bill.
[347] See 3 3 above.

3 4 2 The disposal of agricultural land by foreigners

The Regulation Bill specifically regulates the disposal of agricultural land holdings by a foreign person.[348] In this regard, the Regulation Bill provides for a new procedure whereby foreign persons dispose of agricultural land.[349] Where a foreign person intends to dispose of his or her agricultural land, it must first be offered to the Minister, in the prescribed manner.[350] In this regard, the Minister has a right of first refusal to acquire ownership of the relevant parcel of land.[351] Thereafter, the Minister must, within 90 days, decide whether there is an intention to acquire the land holding.[352] If the Minister does not express an intention to acquire the agricultural land holding or indicates that he or she is not going to take up the offer, the foreign person must make the land available for acquisition by "citizens"[353] on the open market.[354]

The right of first refusal mechanism in effect and indirectly allows the Minister to (a) obtain agricultural land for redistribution in order to support and promote productive employment and income to poor and efficient small scale farmers; and to (b) ensure redress for past imbalances in access to agricultural land.[355] The right of first refusal given to the government serves as a mechanism aimed at making more land available for acquisition and redistribution purposes. However, possible issues of constitutionality and/or efficacy emerge that require investigation.[356] Such issues are discussed in Chapter 4 and 6 respectively.

Unless proof is provided that these provisions had been complied with, the registrar may not execute a deed of transfer.[357] Where agricultural land is at stake, the disposal of the land must be reflected in the register.[358] Accordingly, it is required that a notification, pertaining to the disposal of the land, has to be submitted.[359] The registrar must provide the Land

[348] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[349] Pienaar (2017) *JQR* 3.
[350] Clause 21(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[351] Clause 21(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[352] Clause 21(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[353] Clause 1 of the Regulation of Agricultural Land Holdings Bill provides that "citizen" means — "(a) a person who is a South African citizen in terms of the provisions of the South African Citizenship Act, 1995 (Act No. 88 of 1995); (b) a person with permanent residence status in terms of the Immigration Act, 2002 (Act No. 13 of 2002); (c) a juristic person; (d) a trust; or (e) a person who is not a foreign person".
[354] Clause 21(2)(b) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[355] See clause 3 of the Regulation of Agricultural Land Holdings Bill.
[356] Sections 25(1) and (2) of the Constitution of the Republic of South Africa, 1996; *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[357] Pienaar (2017) *JQR* 3.
[358] Pienaar (2017) *JQR* 3. See also Mostert & Pope (eds) *The Principles of the Law of Property* 211-214; Van der Walt & Pienaar *Introduction to the Law of Property* 154-160.
[359] Clause 22(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.

Commission, within 30 days of the registration of the disposal, with a copy of the notification of the disposal.[360] Pienaar states that:

> "It is unclear how the new acquisition is to be recorded where the Minister took up the offer to purchase the land from the foreign person. In other words: is the new acquisition recorded under the public register (because the Minister bought the land in his official capacity) or under the private register as it will be utilised, finally, for purchase or acquisition by private individuals. The register will be adapted, nevertheless, as there will indeed be a shift from foreign land holding to South African land holding, either in the public or the private sphere". [361]

Where a person ceases to be a foreign person,[362] a notification is also required.[363] Further questions arise in this regard, such as whether the person will now be able to acquire ownership of agricultural land and whether a new classification is necessary, or whether an automatic process starts.[364] Likewise, on becoming a foreign person a notification is also required.[365] "Again, it is unclear whether such notification automatically starts various processes or what the required response and/or channel would be for action".[366]

3 4 3 The acquisition of agricultural land by foreigners

Foreigners are prohibited from acquiring ownership of agricultural land from the date of the commencement of the Regulation Bill.[367] This prohibition does not apply in instances where agricultural land is acquired by a "foreign person" where a Black person has a controlling interest.[368]

Foreign persons who are currently agricultural land owners will thus retain their ownership of the land once the Act commences. Importantly, this provision does not aim to extinguish a foreign person's ownership of agricultural land. The Regulation Bill only prohibits foreigners, in relation to future acquisitions of agricultural land, from obtaining ownership of

[360] Clause 22(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[361] Pienaar (2017) *JQR* 3.
[362] For example where a natural foreign person becomes a citizen under the South African Citizenship Act 88 of 1995 or obtains permanent residence status in terms of the Immigration Act 13 of 2002 or where a juristic foreign person or "foreign trust" no longer holds a controlling interest.
[363] Clause 23 of the Regulation of Agricultural Land Holdings Bill.
[364] Pienaar (2017) *JQR* 3.
[365] Clause 24 of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[366] Pienaar (2017) *JQR* 3.
[367] Clause 19(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[368] Clause 19(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.

the property. Accordingly, the provision *prima facie*, does not infringe the right to property.[369] Furthermore, in principle, this prohibition on foreign ownership does not prevent *access* to agricultural land.[370] Contrary to the provisions of SALA, which prohibit the long-term lease of a portion of agricultural land without ministerial consent,[371] the Regulation Bill makes provision for long-term leases:[372]

> "A foreign person may, from the date of the commencement of this Act, conclude a long term lease of agricultural land holdings".[373]

Ordinarily, the period of a long-term lease (*in longum tempus*)[374] is a minimum of ten years or longer.[375] However, the Regulation Bill defines "long term lease"[376] as:

> "any registered lease of agricultural land which, when entered into, was for a period of not less than 30 years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable at the will of the lessee for a period or periods which together with the first period amount to not less than 30 and not more than 50 years".[377]

Accordingly, a lease must be entered into between the foreign person and the Government for a minimum of 30 years, which may be renewed, provided that the overall period does not amount to more than 50 years. The lessee and the lessor must submit such a lease to the registrar.[378] The registrar must, within 90 days of receipt of the lease, register the lease in the register or record of the deeds registry. [379]

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[369] This is because section 25(1) of the Constitution of the Republic of South Africa, 1996 only entrenches negative protection of property and does not expressly guarantee the right to acquire, dispose or hold property. See also *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
[370] Pienaar (2017) *JQR* 3.
[371] Section 3(d) of the Subdivision of Agricultural Land Act 70 of 1970; Badenhorst, Pienaar & Mostert *The Law of Property* 430-431.
[372] Clause 20(1) of the Regulation of Agricultural Land Holdings Bill.
[373] Clause 20(1) of the Regulation of Agricultural Land Holdings Bill.
[374] S Viljoen *The Law of Landlord and Tenant* (2018) 52-54, 111 provides that it is important to distinguish between registered and unregistered long-term leases. Registered leases, in terms of the Deeds Registries Act 47 of 1937, create limited real rights that are enforceable against third parties. In other words, long-term tenants are protected for the full term of the lease against successors in title and all creditors, provided that the lease is registered against the title deed of the leased property. However, the rights of unregistered long-term tenants, as regulated by the Formalities in Respect of Leases of Land Act 18 of 1969, are more contested. See also Van der Walt & Pienaar *Introduction to the Law of Property* 326-329.
[375] See the definition of "immovable property" in the Deeds Registries Act 47 of 1937 and section 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969. See also Viljoen *The Law of Landlord and Tenant* 52-54, 111; Van der Walt & Pienaar *Introduction to the Law of Property* 326-329; Badenhorst, Pienaar & Mostert *The Law of Property* 430-431.
[376] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[377] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[378] Clause 20(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[379] Clause 20(2) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.

Therefore, two aspects are important: (a) the Regulation Bill does not aim to extinguish *existing* rights overnight;[380] and (b) access to land is retained, but in the form of a limited real right (a lease) and not in the form of ownership. The prohibition on the acquisition of agricultural land by foreigners in effect provides citizens with an opportunity and preference to acquire ownership of land parcels.

In light of this, the study aims to determine whether the restrictions in relation to the disposal of agricultural and the prohibition on acquisition of agricultural land by foreign nationals are constitutional.[381] The study will specifically investigate whether the restriction of a legal entitlement to acquire property rights in respect of agricultural land in the form of a long-term lease will constitute an arbitrary deprivation of property.[382]

4 Conclusion

This Chapter begins with an exposition of the concept of ownership in the South African context. The concept of ownership has never been absolute and is subject to various regulatory provisions or measures, impacting ownership entitlements of the land owner.[383] While various regulatory mechanisms exist, the discussion in this Chapter was restricted to: (a) restrictions on subdivision of agricultural land; (b) the placing of land ceilings; and (c) restrictions on the disposal and acquisition of agricultural land by foreigners. Specifically, the provisions of SALA and the Regulation Bill were discussed. These mechanisms not only affect ownership entitlements, such as the right to dispose of property, but may also contribute towards redistributing agricultural land to intended beneficiaries. For example, the regulatory mechanisms may make more agricultural land available for redistribution purposes.

Whether the prohibition on subdivision in SALA is a constraint to redistribution turns on the debate whether small or large-scale farms are more productive.[384] Furthermore, it can be argued that SALA (read with Act 126) ensures that agricultural land identified for acquisition for redistribution purposes is not subdivided and transferred to unintended beneficiaries. In other words, SALA ensures rather than restrains redistribution of agricultural land.

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[380] In this regard it is important that the provisions of the Regulation Bill will not operate retrospectively.
[381] See Chapter 4, 3 4 2 3 below.
[382] See Chapter 4, 3 4 2 3 below.
[383] Van der Walt *Constitutional Property Law* 91.
[384] See 3 2 4 above.

Although a number of concerns, challenges and pitfalls were identified,[385] the Regulation Bill makes provision for two regulatory mechanisms that broaden access to land and promote or contribute towards the redistribution of agricultural land. In this regard, the imposition of land ceilings creates "redistribution agricultural land" which must first be offered to Black citizens. In principle, this mechanism promotes a more equal distribution of agricultural land in terms of race, provided that Black citizens acquire the land.

Furthermore, in principle, the prohibition on foreigners acquiring ownership of agricultural land makes more land available for acquisition by citizens. In this way, the prohibition broadens access to agricultural land. Similarly, the restriction on the disposal of agricultural land by foreigners indirectly contributes towards making more agricultural land available for redistribution purposes. The right of first refusal granted to the Minister, makes more land available to redistribute to intended beneficiaries of the redistribution programme.

Despite ownership entitlements being subject to the provisions of SALA and the Regulation Bill, the imposition of such regulatory measures must pass constitutional muster.[386] Accordingly, the following chapter aims to determine whether the (a) restrictions on subdivision of agricultural land; (b) the imposition of agricultural land ceilings; and (c) restrictions on the disposal and acquisition of agricultural land by foreigners are constitutional. Such regulatory measures must also constitute effective measures for broadening access to land and redistribution purposes. The efficacy of these measures are explored in chapter 6.

Essentially, the regulatory mechanisms in the Regulation Bill may open up land for acquisition to speed up the redistribution process. Once land is made available for redistribution, it needs to be acquired. The different methods for acquiring agricultural land, the requirements for the different methods and the implications thereof for redistribution are discussed in Chapter 6 below.

[385] See 3 3 3 2 above.
[386] Section 25(1) of the Constitution of the Republic of South Africa, 1996.

Chapter 4: The constitutionality of mechanisms for the regulation of agricultural land

1 Introduction

The regulatory mechanisms discussed in Chapter 3 may restrict or deprive an owner of his or her ownership entitlements.[1] Any restriction on the owner's right to property or ownership entitlements needs to comply with the provisions of the Constitution.[2] Section 25(1) of the Constitution provides that:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

The Constitution provides for deprivation of property and sets out the requirements that must be met in order for a deprivation to be constitutionally valid.[3] In other words, section 25(1)

[1] AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016) 47-50 provide that the content of ownership must be determined within the context of each individual case. The content of ownership may include several entitlements, notably the entitlement to use (*ius utendi*), dispose or alienate (*ius dispondendi*) and vindicate (*ius vindicandi*) the property. Other entitlements may include the entitlement to fruits (*ius fruendi*), to possess (*ius possidendi*), to resist any unlawful invasion (*ius negandi*), to encumber and (under some circumstances) even to neglect or destroy the property (*ius abutendi*). Compare H Mostert & A Pope (eds) *The Principles of the Law of Property* (2010) 92-93; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 92-93; CG van der Merwe *Sakereg* 2 ed (1989) 173. See also AJ van der Walt & P Dhliwayo "The notion of absolute ownership and exclusive ownership: A doctrinal analysis" (2017) *South African Law Journal* 34-52 in general. See further H Scott "Absolute ownership and legal pluralism in Roman law: Two arguments" (2011) *Acta Juridica* 23-34, 23; P Birks "The Roman law concept of dominium and the idea of absolute ownership" (1985) *Acta Juridica* 1-37, 1; D Visser "The absoluteness of ownership: The South African common law in perspective" (1985) *Acta Juridica* 39-52, 39.

[2] Van der Walt *Constitutional Property Law* 17, 214, 218, 251; AJ van der Walt "Transformative constitutionalism and the development of South African property law (part 2)" (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 1-31; Van der Walt & Pienaar *Introduction to the Law of Property* 345-346; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD, Stellenbosch University (2015) 110, 128.

[3] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 46. The following cases also subsequently followed the *FNB* methodology: *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC); *Offit Enterprises v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC); *National Credit Regulator v Opperman* 2013 2 SA 1 (CC); *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC); *Jordaan v City of Tshwane Metropolitan Municipality and others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited; Ekurhuleni Metropolitan Municipality v Livanos and others* 2017 6 SA 287 (CC). See further Van der Walt *Constitutional Property Law* 222; T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2009, OS 2003) 46-1-46-37, 46-3-46-5. Furthermore see EJ Marais "Expanding the contours of the constitutional property concept" (2016) *Tydskrif vir die Suid-Afrikaanse Reg* 576-592 592 where the author states that *Shoprite* "confirms that *FNB* is still the leading judgment when it comes to adjudicating section 25 disputes, since the three legal questions set out by the majority accord with the first three steps in the *FNB* case methodology". See also FJ Michelman & EJ Marais "A constitutional vision for property: *Shoprite Checkers* and beyond" in G Muller, R Brits, B Slade & J van Wyk

creates a framework for the legitimate regulation of property.[4] Van der Sijde points out that the property clause must be interpreted in such a way so as to strike an appropriate balance between the protection of private property and the need to ensure that the property serves the public interest.[5] Importantly, Van der Sijde explains that:

> "The question…is not whether a government has the power to regulate the use of property but rather the extent to which the state can regulate vested rights and what the consequences of regulation are."[6]

Accordingly, it is necessary to determine whether the imposition of regulatory measures, namely (a) restrictions on the subdivision of agricultural land; (b) limiting the amount of land any person may own, namely land ceilings; and (c) restrictions imposed on foreigners in relation to the disposal and acquisition of agricultural land, are constitutional. Before this determination can be made, the methodology for determining whether the implementation of a regulatory mechanism constitutes an arbitrary deprivation must first be set out. To this end, the methodology as set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,[7] ("*FNB*")[8] will be employed to determine whether the implementation of these regulatory measures in the context of agricultural land are constitutional. In other words the question is whether any of the regulatory measures listed above arbitrarily deprives a person of his or her property. Each step or question of the methodology is set

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(eds) *Transformative Property Law: Festschrift in honour of AJ van der Walt* (2018) 121-146 and BV Slade & R Walsh "The marginality of property in expropriation law: A comparative assessment " in G Muller, R Brits, B Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in honour of AJ van der Walt* (2018) 21-50.

[4] Van der Walt *Constitutional Property Law* 17, 190, 214, 218, 251; Badenhorst, Pienaar & Mostert *The Law of Property* 96; Van der Sijde *Reconsidering the relationship between property and regulation* 106. See also recent developments regarding the possible amendment of the Constitution to allow for expropriation without compensation in Chapter 5, 3 3 2 – 3 3 3 below. In this regard, see B Hoops "Expropriation without compensation: A yawning gap in the justification for expropriation?" (2019) 136 *South African Law Journal* 261-302; T Ngukaitobi & M Bishop "The Constitutionality of Expropriation without Compensation" <https://www.wits.ac.za> (accessed 02-08-2019); Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 30-07-2019) 66-75. See futher *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) para 97 where the Court held that: "…there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation".

[5] Van der Sijde *Reconsidering the relationship between property and regulation* 97; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 81. See also Van der Walt *Constitutional Property Law* 17, 42; Van der Walt (2006) *TSAR* 1-31; Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 66-75.

[6] Van der Sijde *Reconsidering the relationship between property and regulation* 128.

[7] 2002 4 SA 768 (CC).

[8] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) para 56.

out and discussed. Subsequently, each regulatory measure is analysed to determine whether it complies with the requirements of the *FNB* methodology to establish whether it is constitutional.

2 The *FNB*-methodology

2 1 Introduction

Section 25(1), as interpreted in the *FNB* judgment, provides for a framework for the legitimate regulation of property. The Constitutional Court set out a series of steps or stages that constitute a methodology for determining whether a deprivation of property is constitutional.[9] Each of the following questions represents a step of the methodology:[10]

(a) Does that which is taken away or interfered with amount to property for purposes of section 25?

(b) Has there been a deprivation of such property?

(c) If there has been a deprivation, is such a deprivation consistent with the provisions of section 25(1)?

(d) If not, is such a deprivation justified in terms of section 36 of the Constitution?

(e) If it is, does it amount to expropriation in terms of section 25(2) of the Constitution?

(f) If so, does the deprivation comply with the requirements of sections 25(2)(a) and (b)?

(g) If not, is the expropriation justified under section 36?

Some of these steps set out in *FNB* correlates to the requirements in section 25(1) of the Constitution, for a constitutional deprivation: (a) the deprivation must be effected in terms of law of general application; and (b) the law must not permit arbitrary deprivations.[11]

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[9] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) para 4.
[10] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) para 46. Furthermore see, *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC); Marais (2016) *TSAR* 592; Roux "Property" in *CLOSA* 46-3-46-5.
[11] Roux "Property" in *CLOSA* 46-3-46-5.

It is acknowledged that the *FNB*-methodology has not been without critique and has certain pitfalls and shortcomings.[12] There may be various adjusted versions of the methodology to address the pitfalls and shortcomings. For example, Van der Walt, with the benefit of hindsight, proposed an adjusted version of the methodology.[13] While mindful of the critique and suggested adjustments made to the *FNB*-methodology,[14] the framework is still primarily used in constitutional property law disputes regarding section 25(1). However, it is not the aim of this dissertation to fully analyse and consider whether the *FNB*-methodology is the best available methodology to determine whether a deprivation of property is constitutional. Despite the critique, the *FNB*-methodology is still regarded as authoritative precedent for determining whether there has been a constitutional infringement of a person's property rights in terms of section 25 of the Constitution. It is in this light that the dissertation seeks to use the framework provided for by the *FNB*-methodology to test regulatory measures against the requirements in section 25.

2 2 Does that which is taken away or interfered with amount to property for purposes of section 25?

The first step in the *FNB*-methodology inquires whether that which is taken away or interfered with constitutes "property" for purposes of section 25 of the Constitution.[15] The Court in *FNB* declined to provide for a comprehensive definition of property for purposes of

[12] See Roux "Property" in *CLOSA* in general. See also T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 265-281 and AJ van der Walt "Section 25 vortices (part 1)" (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412-427; AJ van der Walt "Section 25 vortices (part 2)" (2016) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 597-621.

[13] Van der Walt (2016) *TSAR* 616-617 provides for an amended or different version of the *FNB* methodology with the following steps or questions:
"1. Beneficiaries: is the complainant a beneficiary of section 25 protection?
2. Property: is the alleged property interest constitutional property for purposes of section 25?
3. Deprivation or expropriation: is the alleged interference with the protected property interest:
a. a deprivation of property covered by section 25(1)?
b. an expropriation of property covered by section 25(2)-(3)?
4a. Deprivation: if the interference is a deprivation of property, is it:
a. authorised by law of general application?
b. if it is authorised by law of general application, does the law permit arbitrary deprivation of property?
4b. Expropriation: if the interference is an expropriation, is the expropriation:
a. authorised by law of general application?
b. for a public purpose or in the public interest?
c. accompanied by provision of just and equitable compensation?
5. Justification: if the law of general application
a. permits arbitrary deprivation of property [or]
b. authorises expropriation without providing for just and equitable compensation, is
it justifiable in terms of section 36(1)?".

[14] Van der Walt (2016) *TSAR* 616-617.

[15] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) para 46. See furthermore, Van der Walt (2016) *TSAR* 599-605.

section 25.[16] Accordingly, the meaning and scope of "property"[17] has to be determined in each individual case.[18]

Roux regards the inquiry whether the interest at stake constitutes constitutional property as the threshold question in any constitutional property inquiry.[19] However, Van der Walt argues that the property question in *FNB* was not treated as a threshold question in any substantive sense.[20] Instead, the Court dealt with the property question in a principled manner by relying on constitutional and contextual factors outside section 25 in its analysis whether a particular property interest should be recognised as property for purposes of section 25. In *FNB*, the property interest in question (corporeal movables) was unproblematic.[21] However, the Court indicated that extensions of the category of interests that should be recognised as property, goes beyond that which is traditionally recognised as property in private law.[22] Furthermore,

[16] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 51.
[17] A broad range of rights and interests have been accepted as property for purposes of section 25, including (but not limited to): land and corporeal movables (*First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC)); trademarks, which potentially opens up the possibility of recognising other intellectual property rights as property (*Laugh it off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 1 SA 144 (CC)); mineral rights (*Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC)); goodwill (*Phumelela Gaming and Leisure Limited v Gründlingh* 2006 8 BCLR 883 (CC)); a grocer's wine licence (*Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC)); licences more generally (*South African Diamond Producers Organisation v Minister of Minerals and Energy N.O* 2017 6 SA 331 (CC)); personal servitudes (*National Credit Regulator v Opperman* 2013 2 SA 1 (CC)); servitudes generally (*National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 2 SA 157 (SCA)); and public servitudes (*City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC)).
[18] Van der Walt *Constitutional Property Law* 113, 117; *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) paras 57-64 where the Court established factors for construing the South African constitutional property concept. See also *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC) para 39 and specifically where the Court held that: "[T]o determine what kind of property deserves protection under the property clause cannot be restricted to private law notions of property. To do so would exclude other potential constitutional entitlements that may deserve protection from the ambit of protection under the property clause. It could also inadvertently lead to a failure to subject private law notions of property to constitutional scrutiny in order to ensure that they accord with constitutional norms. Extending our conception of property to embrace constitutional entitlements beyond the original ambit of private common law property will ensure that the property clause does not become an obstacle to the transformation of our society, but central to its achievement." See further Van der Walt (2016) *TSAR* 599-605.
[19] Roux "Property" *CLOSA* 46-10; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.
[20] Van der Walt (2016) *TSAR* 599.
[21] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 49(c).
[22] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 49(d) referring to AJ van der Walt *The Constitutional Property Clause* (1997) 11.

to determine whether an interest, which is not traditionally recognised as property in private law constitutes property, would require a principled and contextual analysis.[23]

As could be expected, the property question does not require much analysis in cases dealing with ownership of land and corporeal movables.[24] In this regard, the Court in *FNB* held that ownership of land:

> "[L]ie[s] at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right…".[25]

Once it has been established that the right or interest constitutes property for purposes of section 25(1), the next question or step of the *FNB*-methodology becomes relevant.

2 3 Has there been a deprivation of such property?

The second step of the methodology inquires whether there has been a deprivation of property through State action.[26] A determination of what constitutes a deprivation is central to the regulation of the use of property within the context of section 25(1) of the Constitution. The term "deprivation" is often used interchangeably with "limitation" or "regulation".[27] However, these terms are not synonymous in the constitutional context.[28] Accordingly, it is

[23] Van der Walt (2016) *TSAR* 599.
[24] Van der Walt (2016) *TSAR* 599. In *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) it was contested whether the property at stake was a right to use land temporarily or movable corporeal property (gravel) removed from that land, but the Court did not spend any time on the property law question. Furthermore, in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC); *Arun Property Development (Pty) Ltd v Cape Town City* 2015 1 SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC) and the *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) cases dealt with ownership of land and owners' entitlements to use their land. None of the judgments spent any time on the property question. See also Van der Walt *Constitutional Property Law* 115. You may also want to look at (or mention) *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* 2017 (6) SA 331 (CC) as a contrast to the trend of focussing in the property question.
[25] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 51.
[26] Roux "Property" in *CLOSA* 46-17-46-20; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.
[27] Van der Sijde *Reconsidering the relationship between property and regulation* 98. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 315; Van der Walt & Pienaar *Introduction to the Law of Property* 349.
[28] Van der Sijde *Reconsidering the relationship between property and regulation* 98. See further H Mostert *The constitutional protect and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 315 where Mostert explains that "deprivation" is a generic term which circumscribes a whole range of various interferences with the rights of citizens to their property. She also indicates that the terms "regulatory interference" and "acts of police power" are sometimes used to convey the same idea.

necessary to determine when the regulation of property amounts to a deprivation.[29] Generally, a deprivation may be defined as an:

> "[U]ncompensated regulatory restriction or limitation on the use, enjoyment and exploitation of property, in terms of legislation or other 'law'."[30]

Regulating ownership entitlements is referred to as the "police power" of the State.[31]

One way of determining whether a regulatory limitation or restriction amounts to a deprivation of property is to contrast it in some way with an expropriation.[32] Both deprivations and expropriations involve some form of State interference with private property and may bring some measure of loss or diminution of value for the property holder.[33] In fact, deprivations have been regarded as a subset of expropriations.[34] However, the distinction between a deprivation and an expropriation is not always easy to make.[35] In essence, Van der Walt & Pienaar describe the difference as follows:

> "[D]eprivations restrict the owner's use and enjoyment of property…without necessarily taking the property away; whereas expropriation takes the property away from the owner…".[36]

In other words, as Marais explains:

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[29] Van der Sijde *Reconsidering the relationship between property and regulation* 98.
[30] J van Wyk *Planning Law* 2 ed (2012) 212. See also Van der Walt *Constitutional Property Law* 196; Van der Sijde *Reconsidering the relationship between property and regulation* 98-99.
[31] Van der Walt *Constitutional Property Law* 195; Van der Sijde *Reconsidering the relationship between property and regulation* 99; Van der Walt & Pienaar *Introduction to the Law of Property* 349-350.
[32] Van der Walt *Constitutional Property Law* 196. Furthermore see E van der Schyff *Property in Minerals and Petroleum* (2016) 286-288 where Van der Schyff distinguishes between an expropriation and a deprivation. Van der Schyff states that in the pre-constitutional era, the concept of expropriation entailed more than the mere dispossession or deprivation of property. Expropriation requires the "appropriation" of the particular property by the expropriator, which must be accompanied by compensation, whereas the regulation of property (deprivation) merely prevented a person from using his or her property in a particular manner. A deprivation does not entail the acquisition of property or rights and does not require compensation. However, the clear-cut distinction between expropriation and deprivation that existed in the pre-constitutional era could not be maintained in the constitutional era. Expropriation is regarded as a subset of deprivation. While all expropriations are regarded as deprivations, only certain deprivations can be regarded as expropriations. See further B Hoops *et al* (eds) *Rethinking expropriation law II: Context, criteria and consequences of expropriation* (2015) for a comprehensive discussion of the concept of expropriation.
[33] Van der Walt *Constitutional Property Law* 196.
[34] Van der Walt *Constitutional Property Law* 204; Van der Schyff *Property in Minerals and Petroleum* 288.
[35] Van der Walt & Pienaar *Introduction to the Law of Property* 353.
[36] Van der Walt & Pienaar *Introduction to the Law of Property* 353; EJ Marais "Is onteiening sonder vergoeding werklik die antwoord?" (8 February 2018) *Litnet Akademies* <https://www.litnet.co.za/onteiening-sonder-vergoeding-werklik-die-antwoord/> (accessed 25-02-2019) 1-14, 2.

> "Expropriation, therefore, usually entails the compulsory acquisition of property by the state – in other words, without the owner's permission or co-operation – against payment of compensation".[37]

Usually, and especially after *Agri South Africa v Minister of Minerals and Energy*[38] ("*Agri SA*"), it seems clear that State acquisition of property is an element of expropriation,[39] while it is not necessarily an element of deprivation.[40] Furthermore, a property holder will ordinarily not be compensated for a deprivation, whereas expropriations in the South African context currently require compensation.[41] Marais explains further that:

> "The state does not always have to be the ultimate owner – private persons, such as beneficiaries of a land reform programme (especially under the land redistribution programme), may also be the ultimate owners of the expropriated property. It is thus impossible for the state to circumvent its obligation to pay compensation by claiming that the acquisition of property by private persons in such a context does not amount to state acquisition of property."[42]

In *FNB*, the Constitutional Court did not provide a comprehensive or exhaustive definition of what constitutes a "deprivation". Instead, the Court indicated that the concept of a deprivation should be given a very wide meaning.[43] In principle, the Court regarded all restrictions imposed on property as deprivations, because "any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the

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[37] Marais "Is onteiening sonder vergoeding werklik die antwoord?" (8 February 2018) *Litnet Akademies* <https://www.litnet.co.za/onteiening-sonder-vergoeding-werklik-die-antwoord/> (accessed 25-02-2019) 1-14, 8.

[38] 2013 4 SA 1 (CC). See further Badenhorst, Pienaar & Mostert *The Law of Property* 541.

[39] *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) paras 48, 58. However, see paras 77-78 where Cameron J argues that State acquisition should not be regarded as an indispensable prerequisite. See also paras 102-103 where Froneman J argues that Mogoeng CJ erred in extrapolating an inflexible general rule of State acquisition as an essential requirement for expropriation. See also Marais (2015) *PELJ* 2982-3031; Marais (2015) *PELJ* 3032-3061 in this regard.

[40] In light of the distinction proposed by Mogoeng CJ in *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) para 48, Van der Schyff *Property in Minerals and Petroleum* 288 notes that: "It seems as if a constitutional merger has taken place between the two distinct concepts of regulation and expropriation under the umbrella of 'deprivation', as referred to in section 25(1) of the Constitution".

[41] Section 25(2) of the Constitution of the Republic of South Africa, 1996. See also Van der Walt *Constitutional Property Law* 192, 196; Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* 279; Badenhorst, Pienaar & Mostert *The Law of Property* 543.

[42] Marais "Is onteiening sonder vergoeding werklik die antwoord?" (8 February 2018) *Litnet Akademies* <https://www.litnet.co.za/onteiening-sonder-vergoeding-werklik-die-antwoord/> (accessed 25-02-2019) 1-14, 8.

[43] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 49(i)-(l).

person having title or right to or in the property concerned".[44] Accordingly, regulations that affect the use, enjoyment and/or exploitation of the property would result in a deprivation.[45] However, this wide interpretation has not been applied with uniformity in subsequent cases.

In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*[46] ("*Mkontwana*"), it appears as if the Constitutional Court provided for a narrower interpretation of the term deprivation.[47] While the Court agreed with the broad interpretation set out in *FNB*, it created confusion by providing for a narrower interpretation of the term "deprivation".

The Court defined deprivations as instances of regulation that place a "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society".[48] In other words, normal restrictions on the use and enjoyment of property, commonly found in open and democratic societies, might not amount to deprivation.[49] This narrower definition of deprivation could, if applied strictly create a vortex in the sense that it could suck the whole property challenge into the deprivation inquiry. Roux highlights that the *extent* to which the law interferes with a property interest, which is an important factor for determining whether an interference is arbitrary, will not, or should not, be taken into account in determining whether the interference is a deprivation, but rather whether the interference is arbitrary.[50]

Van der Walt argues that the *Mkontwana* decision at least potentially restricts the notion of deprivation to something significantly narrower than the wide definition used in *FNB*, because it excludes all regulatory interferences with property from the section 25 review that are perceived as normal in an open and democratic society: land use and planning

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[44] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57. See also Van der Walt *Constitutional Property Law* 203-204.
[45] Van der Walt *Constitutional Property Law* 124.
[46] 2005 1 SA 530 (CC). See also W Freedman "The constitutional right not be deprived of property: The constitutional court keeps its options open" (2006) *Tydskrif vir Suid-Afrikaanse Reg* 83-100.
[47] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 32. See also Freedman (2006) *TSAR* 93; Van der Walt (2016) *TSAR* 605.
[48] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 32.
[49] Freedman (2006) *TSAR* 85.
[50] Roux "Property" *CLOSA* 46-18; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.

regulation; regulatory control over the use of potentially dangerous property and regulation of all licences and permits.[51] A literal interpretation of a "deprivation" in *Mkontwana* would have restricted deprivation to just those deprivations that are not to be expected in an open and democratic society. In other words, only those excessive and disproportionate deprivations that would have failed the section 36-justification test would constitute deprivations.[52] In this regard, Van der Sijde concurs with Van der Walt and explains that:

> "It seems illogical to restrict the application of section 25(1) to instances of serious restrictions or restrictions that somehow extend beyond what is acceptable in open and democratic societies".[53]

Instead, every instance of regulatory restriction should be capable of being assessed against the requirements in section 25(1), regardless of the severity of the deprivation.[54]

The confusion created by the narrow interpretation in *Mkontwana* is evident in *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*[55] ("*Reflect-All*"), where the Court stated that the Court in *Mkontwana expanded*, rather than restricted, the notion of deprivation of property for purposes of section 25.[56] The Court found that the interference with just one of the landowner's entitlements might be sufficient to establish a deprivation.[57]

Furthermore, in *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd*[58] ("*Offit*"), the Constitutional Court applied the *FNB*-definition of deprivation, but cited *Mkontwana* as authority.[59] Instead of focusing on what would be normal in an open and democratic society, the Court focused on whether the regulatory limitation had a legally relevant impact on the rights of a property holder. In this regard, the Constitutional Court in *National Credit Regulator v Opperman*[60] ("*Opperman*") provided that any legally significant

[51] Van der Walt *Constitutional Property Law* 205-206.
[52] Van der Walt (2016) *TSAR* 606.
[53] Van der Sijde *Reconsidering the relationship between property and regulation* 101.
[54] Van der Walt *Constitutional Property Law* 205-206.
[55] 2009 6 SA 391 (CC).
[56] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC) para 35.
[57] Para 38.
[58] 2011 1 SA 293 (CC).
[59] *Offit Enterprises v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) para 38.
[60] 2013 2 SA 1 (CC).

interference with property amounts to a "deprivation".[61] The definition in *Opperman* alludes to the wider interpretation suggested in *FNB*.[62]

In *Agri SA*, the Constitutional Court held that a "deprivation always takes place when property or rights therein are either taken away or significantly interfered with".[63] At first glance, this definition seems to allude to the narrow interpretation postulated in the *Mkontwana* decision. However, as Van der Sijde points out, it may also be possible that the wording of the Court when referring to "significantly interfered with"[64] was intended to refer to the decision in *Opperman*, where a "legally significant" impact was required for an interference with property to constitute a deprivation.[65]

At most, the post-*Mkontwana* decisions seem to suggest that a deprivation must be legally significant in the sense of not being *de minimus.*[66] In *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape*[67] ("*Shoprite Checkers*") the Constitutional Court explained clearly that the formulation of the *Mkontwana* notion of deprivation, requires an interference with property that is significant enough to "have a legally relevant impact on the rights of the affected party".[68] Van der Walt explains that:

> "[W]hat was a strikingly narrow definition with a potentially sweeping vortex effect in the *Mkontwana* decision, now seems to be associated simply with the much less restrictive - and actually common-sense – observation that deprivation must be significant enough to be legally relevant".[69]

[61] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) paras 39, 41.
[62] Van der Sijde *Reconsidering the relationship between property and regulation* 102.
[63] *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) para 48.
[64] Para 48.
[65] Van der Sijde *Reconsidering the relationship between property and regulation* 102.
[66] Van der Walt (2016) *TSAR* 606.
[67] 2015 6 SA 125 (CC).
[68] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC) para 73, citing *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC) paras 35-36.
[69] Van der Walt (2016) *TSAR* 607.

Accordingly, there is no significant difference between the *FNB*-definition and this refinement thereof.[70] In this regard, the Constitutional Court in *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O.*[71] confirms that:

> "There will be a deprivation only where the interference is "substantial" – meaning that the intrusion must be so extensive that it has a legally relevant impact on the rights of the affected party".

However, the significance of whether a narrow or wide interpretation of deprivation is followed should not be understated. Whether a litigant will be precluded from bringing a case to test the constitutional validity of a regulatory measure, will be dependent on whether the wide or narrow interpretation of the term deprivation is followed.[72] If the narrow interpretation in *Mkontwana* is followed, then the category of regulatory measure that can be challenged in terms of section 25(1) will be limited. Only regulatory deprivations that "go further" than the "normal restrictions" will qualify as a deprivation in this regard. For example, in terms of the narrow interpretation, restrictions on the subdivision of agricultural land may be regarded as normal restrictions in an open and democratic society and will accordingly, not be regarded as a deprivation for purposes of section 25. However, if the preferred wide definition, as proposed in *FNB* and *Opperman* is followed, then any regulatory restriction can be tested and must meet the requirements in section 25(1). Despite the lack of uniformity in the various approaches followed by the Constitutional Court, it seems that a wide interpretation of the term "deprivation" is preferred. Any legally significant interference with property rights, in other words not *de minimus*, can accordingly be tested against the requirements in section 25(1).[73]

A deprivation in itself is not unconstitutional – only where the deprivation amounts to an unauthorised or arbitrary deprivation will property rights be infringed. Consequently, the test

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[70] See *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O* 2017 6 SA 331 (CC) para 48 where a substantial or significant interference was also held as the measure to determine whether the intrustion constituted a deprivation of property.
[71] 2017 6 SA 331 (CC).
[72] Van der Sijde *Reconsidering the relationship between property and regulation* 102-103.
[73] Van der Sijde *Reconsidering the relationship between property and regulation* 102; AJ van der Walt "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 122 *South African Law Journal* 75-89 80; Van der Walt *Constitutional Property Law* 264; GS Alexander "The potential of the right to property in achieving social transformation in South Africa" (2007) 8 *ESR Review* 2-9 5-6. See also *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O* 2017 6 SA 331 (CC) para 48 where the Court confirms that the interference should be of a substantial or significant nature to constitute a deprivation of property.

as set out in *FNB* for determining whether a deprivation amounts to an arbitrary deprivation is discussed below.

2 4 If there has been a deprivation, is such a deprivation consistent with the provisions of section 25(1)?

Once it has been determined that the imposition of a regulatory measure amounts to a deprivation the investigation is not concluded as the court, in line with the *FNB*-methodology, must consider whether the deprivation complies with the requirements of section 25(1).[74] In terms of section 25(1) a regulatory deprivation must be effected in terms of law of general application and a deprivation may not be arbitrary.[75] These two requirements are accordingly discussed below.

2 4 1 Law of general application

Section 25(1) states that no person may be deprived of property, *except in terms of law of general application*. This phrase ensures that deprivations are legitimately authorised by the common law, customary law or legislation.[76] Furthermore, the interpretation of the phrase "law of general application" is wider than merely legislation that provides for State regulation. It may also include legislative regulations; subordinate legislation; municipal by-laws;[77] rules of court; international conventions and the rules of the common law and customary law.[78] The deprivation is thus the result of law that authorises certain actions or effects.[79] Furthermore, courts must consider whether the authorising law, in fact authorises the specific deprivation (and outcome) in question.[80]

The law must also apply generally. This means that the law may not single out an individual or select a group of individuals in a legally unjustifiable manner.[81] If the regulatory

[74] Roux "Property" in *CLOSA* 46-20- 46-26; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.
[75] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[76] Van der Walt *Constitutional Property Law* 234.
[77] S Woolman & M Bishop (eds) *Constitutional Law of South Africa* vol 2 (2nd ed RS 5 2013) 34-1–34-136, 34-53. However, see Badenhorst, Pienaar & Mostert *The Law of Property* 545 where the authors explain that "administrative regulations are less likely to pass this requirement" and Roux "Property" in *CLOSA* 46-21.
[78] Van der Walt *Constitutional Property Law* 233-234; Badenhorst, Pienaar & Mostert *The Law of Property* 545.
[79] Van der Sijde *Reconsidering the relationship between property and regulation* 114.
[80] Van der Walt *Constitutional Property Law* 236-237.
[81] Van der Sijde *Reconsidering the relationship between property and regulation* 115; Woolman & Botha "Limitations" in *CLOSA* 34-61. Woolman and Botha explain that law of general application must treat persons who are similarly situated alike and the same penalties or privileges must be awarded to similarly situated persons. Also see Van der Walt *Constitutional Property Law* 232; T Roux "Property" in *CLOSA* 46-21.

mechanism constitutes a law of general application the next question is whether the law permits an arbitrary deprivation of property.

2 4 2 Substantive and procedural arbitrariness

Section 25(1) of the Constitution states that no law may permit arbitrary deprivation of property. This subsection does not distinguish between substantive and procedural grounds for a deprivation being arbitrary.[82] However, the Constitutional Court in *FNB* determined that "a deprivation of property is 'arbitrary' as meant in section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the deprivation in question or is procedurally unfair".[83] While the rest of the *FNB* decision proceeds to analyse how substantive non-arbitrariness is to be established,[84] the judgment does not elaborate on the meaning of the phrase "or is procedurally unfair".[85] Notwithstanding the fact that procedural unfairness is not defined or further discussed in *FNB*, it seemingly constitutes an independent ground for finding that a deprivation of property is arbitrary.[86] Consequently, a deprivation can be arbitrary on substantive or procedural grounds.

2 4 2 1 Substantive arbitrariness

In *FNB*, Ackerman J provided a list of considerations to establish whether there is sufficient reason for the deprivation:[87]

> "(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
>
> (b) A complexity of relationships has to be considered.
>
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

[82] AJ van der Walt "Procedural arbitrary deprivation of property" (2012) *Stellenbosch Law Review* 88-94 88; Van der Sijde *Reconsidering the relationship between property and regulation* 121.
[83] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100; Van der Walt (2012) *Stell LR* 88.
[84] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 101-109.
[85] Van der Walt (2012) *Stell LR* 88; Van der Walt *Constitutional Property Law* 264.
[86] Van der Walt (2012) *Stell LR* 88.
[87] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right is something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of the deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the facts of each particular case, always bearing in mind that the enquiry is concerned with arbitrary in relation to deprivation of property under s 25."[88]

Invariably the factors that a court must take into account and the level of scrutiny will vary according to the circumstances of the case.[89] Importantly, the application of the arbitrariness test is contextual and variable. Accordingly, the appropriate test is located on a continuum between thin rationality review[90] and thick proportionality review.[91]

[88] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[89] Roux "Property" in *CLOSA* 46-24; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.
[90] Rationality-review requires that there is a rational connection between the deprivation and the purposes which it seeks to achieve. See *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 51. See also Van der Walt *Constitutional Property Law* 250.
[91] Van der Walt *Constitutional Property Law* 244 explains that the thick proportionality-type review endorsed in *FNB* falls short of the "full blown" proportionality test of section 36(1) of the Constitution. See *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 65. See also IM Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" (2014) 17 *Potchefstroom Electronic Law Journal* 2229-2267 2250; Van der Sijde *Reconsidering the relationship between property and regulation* 237.

In some instances, the combination of factors enunciated in *FNB* will require or justify a lower level of judicial scrutiny, closer to rationality review.[92] The test for rationality, at the lower end of the continuum, merely requires that there must be a rational connection between the means (the regulatory deprivation) employed by the State and the legitimate purpose it seeks to achieve[93] and requires "nothing more than the absence of bias or bad faith".[94] In other words, for a deprivation to satisfy this test, it must simply be capable of achieving the State's legitimate purpose. Arguably, the test imposes very few restrictions on the State's power to regulate and interfere with private property.

In other instances, something closer to full proportionality review may be required.[95] Despite the casuistic manner in which courts may approach the arbitrariness question, there seems to be a fair amount of consensus among academic authors[96] on the elements of proportionality.[97] These elements, in a case where something closer to full proportionality review is required, may be considered to determine whether a regulatory measure provides sufficient reason for the deprivation. The elements of proportionality may be categorised as follows: (a) legitimacy;[98] (b) suitability;[99] (c) necessity;[100] and (d) fair balance.[101] Each of the

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[92] Van der Walt *Constitutional Property Law* 237-241; Rautenbach (2014) *PELJ* 2250.
[93] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 98. See further K Hopkins & K Hofmeyer "New perspectives on property" (2003) 120 *South African Law Journal* 48-62, 55-56. Van der Walt *Constitutional Property Law* 237 and Roux "Property" in *CLOSA* 46-21-46-25.
[94] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 62.
[95] Van der Walt *Constitutional Property Law* 237-241.
[96] Rautenbach (2014) 17 *PELJ* 2233; PB Ajoy "Administrative action and the doctrine of proportionality in India" (2012) 1 *Journal of Humanities and Social Sciences* 16-23 and G Quinot (ed) *Administrative Justice in South Africa* (2015) 183 citing JR de Ville *Judicial Review of Administrative Action in South Africa* (2005) 203.
[97] Ajoy (2012) *JHSS* 18-19 distinguishes between two different models for proportionality: The British model (or the State-limiting conception of proportionality) and the European model (or the optimising conception of proportionality). Each of these models has similar elements or stages which may be considered. For instance, both the British and European models consider the following elements: legitimacy; suitability and necessity. The European model has an additional element, "fair balance", which goes further than the test for proportionality under the British model. Rautenbach (2014) *PELJ* 2233 citing M Klatt & M Meister *The Constitutional Structure of Proportionality* (2012) 8-9 also considers the elements of the European model. Furthermore, Quinot (ed) *Administrative Justice in South Africa* 183 citing JR de Ville *Judicial Review of Administrative Action in South Africa* (2005) 203 also provides that proportionality in South African administrative law entails 3 enquiries similar to the British model. C Hoexter *Administrative Law in South Africa* 2 ed (2012) 344 translates these 3 enquiries into 3 elements for proportionality, namely: balance; necessity and suitability. For additional sources see J Rivers "Proportionality and variable intensity of review" (2006) 65 *The Cambridge Law Journal* 174-207, 181.
[98] Ajoy (2012) *JHSS* 18-19. Both the British and European models consider this element as essential whereas the test proposed by De Ville *Judicial Review of Administrative Action in South Africa* (2005) 203 regards this aspect as a threshold question and does not require it to be considered in the proportionality analysis.
[99] This element is found in both the British and European models. Furthermore, De Ville *Judicial Review of Administrative Action in South Africa* (2005) 203 regards suitability and effectiveness in this regard as synonymous.
[100] This element is found in both the British and European model.
[101] Both the British and European model make provision for this element.

elements may be translated into questions: (a) Does the regulatory measure in question pursue a legitimate aim?; (b) is the regulatory measure in question capable of achieving the legitimate aim?; (c) is the regulatory measure the least intrusive means of realising the legitimate aim?; and (d) does the regulatory measure represent a net gain when the reduction in enjoyment of rights is weighed against the level of realisation of the legitimate aim? These elements or inquiries are also considered when the court applies the concept "arbitrary" in the provision in section 25(1) of the Constitution. Accordingly, each of these questions may be considered during the arbitrariness test, if the standard of review amounts to something similar to proportionality review.

The test for proportionality, located at the high end of the continuum, provides that there must be a proportional relationship between the burden imposed by the State and the legitimate purpose it seeks to achieve. In this regard, the court will undertake a contextual investigation and take into account the nature of the right, the person(s) whose property is likely to be affected, the purpose of the deprivation and whether there is an appropriate relationship between the means employed and the ends sought to be achieved. Essentially, the court will consider the *effect or impact* of the deprivation on the affected owner.[102] The authorising law in this regard, must "not impose an unacceptably heavy burden upon or demand an exceptional sacrifice from one individual or a small group of individuals for the sake of the public at large".[103] Consequently, a law that authorises an excessive burden being placed on one individual or a small group of individuals could be arbitrary and invalid even though it serves a legitimate and important public purpose or public interest.[104] In other words, for a deprivation to satisfy this test, it must be the least restrictive method of achieving the State's purpose.[105] This test thus imposes much greater restrictions on the State's power to regulate and interfere with private property.[106]

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[102] Van der Walt *Constitutional Property Law* 237-241.
[103] 238.
[104] LF von Rummel *Arbitrary deprivation of property: A comparative analysis between German and South African Law* (2014) Partial fulfilment of LLM at Stellenbosch University (2014) 10.
[105] Ajoy (2012) *JHSS* 17.
[106] Van der Walt *Constitutional Property Law* 248-256 exaplains that "the *Mkontwana* formulation of the non-arbitrariness test comes much closer to mere rationality than the contexualised, proportionality-focused formulation used in *FNB*." See also Hopkins & Hofmeyer (2003) *SALJ* 55-56; Roux "Property" in *CLOSA* 46-24. Interestingly, Freedman (2006) *TSAR* 97 suggests that neither of these two tests, at least in the form described above, appears to have been applicable in the *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) case. The test which the court applied in order to determine whether there was sufficient reason for the deprivation was one of reasonableness. In *Reflect-All 1025 v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) the Court considered the deprivation serious enough to require a

Roux provides two points of critique on the arbitrariness test.[107] Firstly, Roux argues that the test for arbitrariness leaves too much scope for judicial discretion.[108] While the Court in *FNB* provides for a list of factors to consider whether a deprivation is arbitrary, it seems that the Court retained an almost absolute discretion to decide future constitutional property cases.[109] According to Roux, the test is context-sensitive and it is a judge that will determine whether a mere rationality test or more proportionality-like approach will be applied. The level of scrutiny will accordingly depend on the court's view of the effect of the deprivation on the owner.[110] Accordingly, the test for arbitrariness lacks predictability.[111]

Secondly, Roux argues that the test for arbitrariness has the effect of "telescoping" or "sucking" all property issues into what is framed as the "arbitrariness vortex".[112] In short, he argues that all the questions of the *FNB*-methodology[113] are "sucked into" the question whether there is sufficient reason for the deprivation in question.[114]

Each of these factors needs to be considered to determine whether there is sufficient reason for the interference with property rights[115] by way of restrictions on subdivision; the imposition of land ceilings[116] and the limitations of foreign ownership.

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proportionality enquiry into the means and ends of the legislation. Furthemore in *Offit Enterprises v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) para 44, relying on the definition of "deprivation" set ou in *Mkontwana,* the Court held that there was no deprivation of property as in *FNB, Mkontwana* and *Reflect-All* and therefore the Court did not have to decide on using a thin-rationality review or thick-proportionality test to determine if the derprivation constituted an arbitrary deprivation of property. In National Credit Regulator v Opperman 2013 2 SA 1 (CC) para 71 the Court held that means chosen were disproportionate to the purpose, thereby indicating the use of a thick-proportionality test in the circumstances and finding that the deprivation was abritrary. See R Brits "Abitrary deprivation of an unregistered credit provider's right to claim of performance rendered: *Opperman v Boonzaaier* (24887/2010) 2012 ZACHC 27 (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)" (2013) 16 *Potchefstroom Electronic Law Journal* 422-287, 256-467 and EJ Marais "The constitutionality of section 89(5)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman &* others" (2014) 131 *South African Law Journal* 215-233, 229 in this regard. Furthermore, the application of the factors to determine if there is sufficient reason for the deprivation in *Jordaan v City of Tshwane Metropolitan Municipality and others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited; Ekurhuleni Metropolitan Municipality v Livanos* 2017 6 SA 287 (CC) indicates that the Court opted for the use of the thick-proportionality test given the circumstances of the case.

[107] Roux "Property" in *CLOSA* 46-23-46-24.

[108] 46-24.

[109] 46-24.

[110] Van der Walt (2005) *SALJ* 82.

[111] Roux "Property" in *CLOSA* 46-24.

[112] Roux "Property" in *CLOSA* 46-20; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281. See also Van der Walt (2016) *TSAR* 412-427; Van der Walt (2016) *TSAR* 597-621.

[113] See 2 1 above.

[114] Roux "Property" in *CLOSA* 46-23.

[115] 46-21-46-25.

[116] See 3 4 2 1 – 3 4 2 3 below.

2 4 2 2 Procedural arbitrariness

Although the Court in *FNB* did not elaborate on "procedural fairness as an independent ground for finding that a deprivation is arbitrary",[117] subsequent case law alludes to a definition.

In *Mkontwana*, the Court regarded the notion of procedural fairness as a flexible concept that should be determined with reference to all the circumstances.[118] Van der Walt states that the decision in *Mkontwana* creates the impression that procedural fairness, in terms of section 25(1), will be assessed on the same basis as the test for just administrative action under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). [119]

The Constitutional Court in *Reflect-All*[120] simply referred to the definition of procedurally unfair deprivation in *Mkontwana*[121] without expanding the notion of procedural fairness.[122] In the subsequent Constitutional Court case, the Court in *Offit* likewise did not expand on the definition of procedural unfairness followed in *Mkontwana* and *Reflect-All*. However, in accordance with the *FNB*-methodology,[123] it was not necessary to decide the arbitrariness question in *Offit*, because the Court found that the action complained of did not constitute a deprivation of property. The Constitutional Court also considered the requirements for procedural fairness in *Opperman*. The Court held that where a statutory provision affords a

[117] Van der Walt (2012) *Stell LR* 88. See also Van der Walt *Constitutional Property Law* 264.
[118] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) paras 65-66. On the facts of the case, the Constitutional Court held that every municipality is obliged to provide the owner of the property, upon written request, with copies of outstanding accounts for water and electricity services delivered to occupiers of their property. See also Van der Walt (2012) *Stell LR* 89-90; Van der Sijde *Reconsidering the relationship between property and regulation* 122.
[119] Van der Walt (2012) *Stell LR* 89; Van der Sijde *Reconsidering the relationship between property and regulation* 122.
[120] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC) paras 44-47. In this case the applicants argued that the relevant sections of the Gauteng Transport Infrastructure Act 8 of 2001 were procedurally unfair and therefore arbitrary because they did not provide a procedural mechanism by which the applicant's rights could be protected. However, the court found that consultative processes that took place in terms of the old ordinance must be regarded as having been sufficient. Further consultation was not necessary.
[121] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC) para 40, referring to *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC).
[122] Van der Walt (2012) *Stell LR* 89; Van der Sijde *Reconsidering the relationship between property and regulation* 122.
[123] See 2 above.

court "judicial oversight" but does not afford the court a discretion when making its decision or order, the provision will remain procedurally arbitrary.[124]

Judging from these decisions and the lack of clarity on the definition of procedural fairness as an indication of arbitrariness in the context of section 25(1), Van der Walt questions whether the notion of procedural fairness has any meaning at all.[125] While the Constitutional Court in subsequent case law to *FNB* has drawn a distinction between substantively and procedurally arbitrary deprivation,[126] the Court did not provide clarity on when a deprivation will be procedurally unfair or how procedural unfairness in terms of section 25(1) should be distinguished from procedural unfairness in terms of section 33 of PAJA.[127]

Van der Walt argues, in line with subsidiarity principles,[128] that the notion of procedurally unfair deprivation of property in terms of section 25(1) only makes sense to the extent that it refers to deprivation of property that *does not result from administrative action*.[129] Importantly, a deprivation of property brought about by administrative action should, in the first place, be adjudicated in terms of the provisions of PAJA and not in terms of section 25(1).[130] In other words, where an administrative action amounts to a deprivation of property, and the deprivation is alleged to be procedurally unfair, section 25(1) will not be applicable and a litigant will have to rely on the remedies provided by the appropriate legislation, in this case PAJA.[131] Only a deprivation of property that occurs outside the sphere of PAJA should

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[124] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 69. This point was confirmed in *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC) paras 22-24.
[125] Van der Walt (2012) *Stell LR* 89.
[126] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial* Government 2009 6 SA 391 (CC).
[127] Van der Walt (2012) *Stell LR* 90-91; Van der Walt *Property and Constitution* 40-43, 81-91; Van der Sijde *Reconsidering the relationship between property and regulation* 123-124.
[128] Van der Walt *Property and Constitution* 35-37, 40-48; Van der Sijde *Reconsidering the relationship between property and regulation* chapter 4.2.
[129] Van der Walt (2012) *Stell LR* 93-94; Van der Sijde *Reconsidering the relationship between property and regulation* 124. Roux "Property" in *CLOSA* 46-25 addresses this issue without reference to subsidiarity principles. He argues that because section 33 of the Constitution deals with administrative action rather than "law" (as required in section 25(1) of the Constitution), there will generally be no overlap. He explains that when administrative action deprives a person of property in a procedurally unfair manner, a litigant will be able to challenge the matter under PAJA. However, when a law provides for a deprivation of property in a procedurally unfair matter, section 25(1) of the Constitution will be applicable.
[130] Van der Walt (2012) *Stell LR* 93; Van der Walt *Property and Constitution* 35-37, 40-48; Van der Sijde *Reconsidering the relationship between property and regulation* chapter 4.2.
[131] Van der Walt (2012) *Stell LR* 91-92; Van der Sijde *Reconsidering the relationship between property and regulation* 124.

be adjudicated in terms of section 25(1).[132] This would be the case where a deprivation of property was caused directly by legislation[133] and not administrative action.[134] However, as Van der Walt argues further, the test for procedural unfairness in the context of section 25(1) will probably resemble procedural fairness principles developed in administrative law, simply because other suitable principles do not exist outside of administrative law.[135]

In administrative law, the right to procedurally fair administrative action involves the possibility to influence the outcome of an administrative decision that might have a negative impact on a person's rights.[136] This principle entitles a person to be heard during the decision-making process and proscribes bias.[137] With regard to the latter aspect of the principle, a deprivation caused directly by legislation already embodies the rule against bias in the requirement that the deprivation must be authorised by law of general application.[138] Accordingly, this aspect of procedural fairness will most likely not find much application in the context of section 25(1) where legislation that directly causes deprivation of property is challenged.

With regard to the principle which entitles a person to be heard during the decision-making process, procedural fairness would probably only have two applications in cases where a deprivation of property is caused directly by legislation.[139] The first possibility is where a deprivation would only be procedurally fair if the legislation provides for judicial oversight.[140] The second possibility would be where a "deprivation would only be procedurally fair if the legislative scheme causing the deprivation provides for a review procedure to ensure that

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[132] Van der Sijde *Reconsidering the relationship between property and regulation* 124 avers that this approach was confirmed in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC) paras 20, 30 although the constitutional challenge before the court was not based on procedural arbitrariness. The majority of the court found that the termination of pre-existing liquor licences occurred automatically through the imposition of a newly legislated regulatory scheme. The provisions should therefore be challenged in terms of section 25(1) of the Constitution directly and the provisions of PAJA have no role to play.

[133] Or in terms of the common law or customary law. However, presumably, there would be no procedures in terms of these areas of law to conceive of.

[134] Van der Walt (2012) *Stell LR* 93.

[135] 93-94.

[136] J Klaaren & G Penfold "Just Administrative Action" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa 4* 2 ed (OS 2008) ch 63-81. See further Hoexter *Administrative Law* 363; Van der Walt (2012) *Stell LR* 93.

[137] Klaaren & Penfold "Just Administrative Action" in *CLOSA* ch 63-81. The common-law rules of natural justice embody this principle because they ensure that people adversely affected by decisions would know about such decisions and would be able to participate in the decision-making process by being provided the opportunity to state their case. See Quinot (ed) *Administrative Justice in South Africa* 147-148 in this regard.

[138] Van der Walt (2012) *Stell LR* 93.

[139] 93-94.

[140] 94.

the deprivation does not become arbitrary purely because of its duration".[141] In other words, a statutory deprivation of property may be procedurally arbitrary if the legislation "does not provide for either judicial oversight or periodic review of the legislative framework that allows or brings about the deprivation".[142]

2 5 Can the arbitrary deprivation of property be justified under section 36 of the Constitution?

If it is found that the deprivation did not take place in terms of law of general application or the law authorising the deprivation is arbitrary, then section 25(1) is infringed. However, theoretically, and in accordance with the *FNB*-methodology,[143] the State could seek to justify such an infringement under the general limitation clause, section 36 of the Constitution. The Court in *FNB* therefore foresaw that section 36 could possibly have a role to play in constitutional property disputes in terms of section 25(1). However, the Court did not expressly decide on the matter.[144]

Despite this step or question, there has been speculation by many authors whether section 36 has, or will ever have, any role to play in constitutional property disputes in terms of section 25(1).[145] Roux argues that the application of section 36 to infringements of section 25(1) is riddled with "conceptual difficulties".[146] A deprivation that does not meet the requirements of section 25(1) is unlikely to be justified in terms of section 36(1) because the requirements in terms of the two sections are very similar.

Firstly, a deprivation that is not authorised by law of general application in terms of section 25(1) will also not be justifiable under section 36(1) because it likewise requires a law of general application.[147] Secondly, if a law permits the arbitrary deprivation of property, it is unlikely to be "reasonable and justifiable in an open and democratic society" as required by

[141] Van der Walt (2012) *Stell LR* 94.
[142] 94.
[143] See 2 above.
[144] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 58, 110.
[145] Van der Sijde *Reconsidering the relationship between property and regulation* 126. Van der Walt AJ *Constitutional property law* 285; Roux "Property" in *CLOSA* 46-26; Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* 271-272; IM Rautenbach "The limitation of rights in terms of provisions of the bill of rights, other than the general limitation clause: A few examples" (2001) *Tydskrif vir die Suid-Afrikaanse Reg* 617-641 621.
[146] Roux "Property" in *CLOSA* 46-26; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.
[147] Roux "Property" in *CLOSA* 46-26; Rautenbach (2001) *TSAR* 634; Van der Walt *Constitutional Property Law* 219; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.

section 36(1).[148] Furthermore, the factors considered in terms of section 36 to determine whether a limitation is justifiable and those in section 25(1) to determine whether there was sufficient reason for the deprivation, are similar.[149]

According to the *FNB*-methodology, the arbitrariness test operates on a sliding scale that varies from mere rationality to something almost (but apparently not quite) as substantive as the proportionality test in section 36.[150] However, the Constitutional Court has not yet explained how the proportionality-type test during the first stage of the section 25-inquiry would differ from a full-blown proportionality test used during the second stage section 36(1) analysis.[151] Roux explains further that:

> "In cases where the test for arbitrariness approximates rational basis review rather than proportionality, the conceptual case for the non-compliance of s 36 is strongest: a law that infringes s 25(1) for lack of means-end rationality will never be capable of justification under the general limitation clause. At the other end of the scale, where the test for arbitrariness approaches a test for proportionality, the application of s 36 can at best confirm a conclusion already reached under s 25(1)…".[152]

In these circumstances, it is difficult to imagine a situation where a deprivation fails to meet the non-arbitrariness requirement under section 25(1), but is still capable of being saved by section 36(1). In this light it is not necessary to apply the section 36 limitation analysis for purposes of the dissertation, because it will arguably render the same result as discussed under the arbitrariness requirement.

2 6 Does the deprivation amount to an expropriation in terms of section 25(2) of the Constitution?

Where a deprivation passes scrutiny under section 25(1) and/or under section 36(1), the next step in the *FNB*-methodology is to determine whether the deprivation amounts to an expropriation of property. As the property clause is currently formulated, the determination whether an interference with property is regarded as a deprivation or expropriation is

[148] Roux "Property" in *CLOSA* 46-26; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.
[149] Van der Walt *Constitutional Property Law* 74, 243-244 explains that the requirements described in section 36(1) amount to a proportionality test that is similar in spirit, but stronger in force, than the (variable) non-arbitrariness test laid down in the *FNB* decision.
[150] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(g).
[151] Van der Walt *Constitutional Property Law* 244-245.
[152] Roux "Property" in *CLOSA* 46-27; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.

significant because there may be additional requirements that have to be fulfilled for an expropriation to be valid. Marais explains as follows:

> "As only expropriation carries the obligation to pay compensation, there is an incentive for property holders to label any infringement with their property as expropriation. For this reason, it is crucial to have a principled distinction between these forms of limitation, especially in view of the dangers that uncertainty in this regard could hold for land reform initiatives in the South African context, where legitimate (but burdensome) regulatory measures could be challenged as amounting to expropriation which requires compensation."[153]

Generally, expropriation is defined in contrast with deprivation.[154] Van der Walt points out that: "[T]his distinction is neither entirely clear nor consistent".[155] Realistically, there may be numerous grey areas where it may not be easy to regard the State action limiting private property as either a deprivation or an expropriation.[156]

The distinction between deprivation and expropriation was first dealt with in *Harksen v Lane NO* ("*Harksen*").[157] The Constitutional Court distinguished between deprivation and expropriation categorically, regarding them as distinct notions with characteristics that are distinguishable from each other clearly and exhaustively.[158] According to the Court in *Harksen* the main characteristics that distinguish deprivation from expropriation are twofold: (a) that the effect of (and intention with) the expropriation is to divest the former owner of the property; and (b) to vest the property in question in the expropriating authority permanently. It follows that if the property is not acquired by the State, or if the acquisition is not permanent, then there is no expropriation.[159] Van der Walt criticises the Court in this regard because permanence is not in itself a reliable basis to distinguish between deprivation and expropriation. For example, where agricultural land is transferred to land

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[153] Marais (2015) *PELJ* 2984.
[154] See 3 3 above for the definition of a deprivation. A deprivation is usually characterised as (a) a less intrusive limitation of property; (b) where the State regulates the use and enjoyment of private property in the public interest; (c) without the need to compensate the owner.
[155] Van der Walt *Constitutional Property Law* 335.
[156] Van der Walt *Constitutional Property Law* 338. See H Mostert "The distinction between deprivations and expropriations and the future 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on Human Rights* 567-592.
[157] 1998 1 SA 300 (CC). For additional sources see further AJ van der Walt & H Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 12 *South African Public Law* 17-41 19-26.
[158] *Harksen v Lane NO* 1998 1 SA 300 (CC) paras 32-35; Van der Walt *Constitutional Property Law* 340.
[159] Van der Walt *Constitutional Property Law* 339-341; J Swanepoel *Constitutional property law in Central Eastern European jurisdictions: A comparative analysis* LLD, Stellenbosch University (2016) 224. See further, AJ van der Walt "Striving for a better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2005) 123 *South African Law Journal* 854-878 862.

reform beneficiaries, it cannot be said that the property will permanently vest in the State. However, Van der Walt acknowledges that the Court possibly has *finality*, rather than the permanence of the expropriation in mind.[160] Furthermore, the approach in *Harksen* does not allow for any overlap at all between deprivation and expropriation.[161]

The Court in *FNB* effectively abandoned the categorical distinction between deprivation and expropriation set out in *Harksen*. In accordance with the *FNB*-methodology, expropriation is regarded as a form or subset of deprivation.[162] The Court described these notions as two distinct categories of interference with property, where expropriation as a narrower category is included in the wider category of deprivations.[163] In other words, all expropriations are deprivations, but not all deprivations are expropriations.[164] Accordingly, all expropriations must also comply with the requirements for a deprivation, namely (a) law of general application and (b) it may not be arbitrary.[165]

An expropriation is usually regarded as (a) an intrusive limitation which only affects a particular property or owner; (b) where the State acquires private property for a public purpose or public interest; (c) against compensation.[166] According to Van der Walt, a specific redistribution programme or legislation that affects all agricultural land can be categorised as an expropriation.[167] There are exceptions to this rule. For example, if *all* agricultural land

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[160] Van der Walt *Constitutional Property Law* 340.
[161] Swanepoel *Constitutional property law in Central Eastern European jurisdictions* 224-225.
[162] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 57-58. See also *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 48 where the court seemingly confirms this approach.
[163] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57. However, Swanepoel *Constitutional property law in Central Eastern European jurisdictions* 221, 227-228 questions whether the subset approach to this distinction is still followed. He explains that some decisions like *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC); *Arun Property Developent (Pty) Ltd v City of Cape Town* 2015 2 SA 584 (CC) and *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) have created uncertainty regarding which approach the court follows in distinguishing a deprivation from an expropriation. However, while mindful of these judgments, such a case analysis falls outside the scope of this dissertation.
[164] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57. See further Van der Walt *Constitutional Property Law* 341-342; Van der Walt (2005) *SALJ* 868; EJ Marais "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part 1)" (2015) 18 *Potchefstroom Electronic Law Journal* 2983-3031 298; Van der Schyff *Property in Minerals and Petroleum* 287.
[165] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC)) paras 58-59; Van der Walt *Constitutional Property Law* 341-342. See further Van der Walt (2005) *SALJ* 868; Marais (2015) *PELJ* 298.
[166] Van der Walt *Constitutional Property Law* 335, 344-347; Swanepoel *Constitutional property law in Central Eastern European jurisdictions* 222-223.
[167] Van der Walt *Constitutional Property Law* 338.

is expropriated, then it would most likely take the form of nationalisation rather than expropriation,[168] with the result that compensation is excluded or limited.[169] As mentioned above,[170] the State acquisition requirement is set out in *Agri SA*.[171] The Court held that the claimant must establish that the State has acquired the substance or core content of what the claimant was deprived of. However, the rights acquired by the State do not have to be exactly the same as the rights that were lost.[172] Marais argues that State acquisition of property should be regarded as a *consequence* of the expropriation, rather than a *requirement* for expropriation.[173] Furthermore, Van der Walt states that State acquisition "cannot be regarded as a single defining characteristic, although it may be one of the factors to be considered".[174] Despite this critique, it seems that deprivation and expropriation are viewed as two distinct categories of interference, with State acquisition as a requirement for expropriation.[175] This means that, if the property is not acquired by the State, then the interference will be regarded as a deprivation. With the requirement of State acquisition in mind, it has to be considered whether the restrictions on subdivision and the imposition of land ceilings amount to expropriation of property.[176]

2 7 If so, does the deprivation comply with the requirements of sections 25(2)(a) and (b)?

Furthermore, if the deprivation amounts to an expropriation, it must comply with the requirements in section 25(2)[177] and section 25(3).[178] In short, the expropriation (a) must be

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[168] Nationalisation may be distinguished from expropriation in two respects. Firstly, the duration of the process of transfer differs between expropriation and nationalisation. While expropriation legislation allows for the process and requirements that have to followed every time property is identified for expropriation, nationalisation legislation usually provides for a process which is to be put into operation only once by operation of law. Both expropriation and nationalisation have the effect that the State becomes the owner of specific property. Secondly, expropriation usually affects only a specific property or owner, whereas nationalisation affects an entire category of property or enterprise.

[169] Van der Walt *Constitutional Property Law* 338. See further AF Wallace *Land Nationalisation: Its Necessity and its Aims* (1892) and K Katzarov *The Theory of Nationalisation* (1964). See also Chapter 5, 4 3 below where nationalisation is contrasted with confiscation.

[170] See 2 3 above.

[171] 2013 4 SA 1 (CC). See definition of "expropriation" in clause 1 of the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.

[172] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 58. See Marais (2015) *PELJ* 3033-3068 where he explains the shortcomings of only relying on State acquisition in the expropriation context. He proposes an alternative approach where one should focus on the purpose, as opposed to the effect, of the impugned statute to answer the expropriation question. Accordingly, the question should rather be what the purpose of the statute is: Is it to regulate the use and enjoyment of property or is the aim of the statute to expropriate the property. See also *Haffejee NO v eThekwini Municipality and Others* 2011 6 SA 134 (CC) para 14 where the Court held that: "The obligation to pay compensation is a condition of expropriation, but not a prerequisite for its operation."

[173] Marais (2015) *PELJ* 3062.

[174] Van der Walt *Constitutional Property Law* 338.

[175] Clause 1 of the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.

[176] See 3 below.

[177] See 2 7 1 and 2 7 2 below.

[178] See 2 7 3 below.

undertaken in terms of a law of general application; (b) must serve a public purpose or public interest; and (c) may only take place against just and equitable compensation.[179] If the deprivation does not comply with these requirements, the expropriation will be invalid and unconstitutional. Each of these requirements will be discussed briefly below.

2 7 1 Law of general application

Section 25(2) of the Constitution states that property may be expropriated in terms of law of general application.[180] Similarly, section 36(1) of the Constitution provides that the rights in the Bill of Rights may only be limited in terms of *law of general application.* Accordingly, many of the same considerations apply in the various stages of the *FNB*-methodology. If the *FNB*-methodology is followed, and if Roux's prediction about the "vortex" effect realises, it is unlikely that property cases would be subjected to this requirement, because it will in all likelihood be dealt with conclusively during the deprivation analysis.[181] In essence, there must be legislation that authorises the expropriation of property.[182]

2 7 2 Public purpose/interest

Section 25(2) of the Constitution provides that property may be expropriated for a public purpose or in the public interest.[183] Furthermore, section 25(4)(a) of the Constitution explains that the public interest includes "the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources". Again, it is unnecessary

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[179] Section 25(2) of the Constitution of the Republic of South Africa, 1996 provides that "property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court". See also Van der Walt *Constitutional Property Law* 335, 452-485.

[180] This requirement is echoed in section 25(1) of the Constitution of the Republic of South Africa, 1996.

[181] Van der Walt *Constitutional Property Law* 452-453; Roux "Property" in *CLOSA* 46-2 – 46-5.

[182] BV Slade "The 'law of general application' requirement in expropriation law and the impact of the Expropriation Bill of 2015" (2017) 50 *De Jure* 346-362. See also Van der Walt *Constitutional Property Law* 453 where the author confirms tat there is no common law authority for expropriation in South African law. *Contra* A Gildenhuys *Onteieningsreg* 2 ed (2001) 93 where he refers to "judicial expropriation".

[183] See XH Nginase *The meaning of 'public purpose' and 'public interest' in section 25 of the Final Constitution* LLM, Stellenbosch University (2009) in general. The thesis discusses the meaning of public purpose and public interest in section 25 of the Final Constitution and aims to answer the question whether 'public purpose' differs from 'public interest'. The thesis also explores the impact of the final Constitution on the interpretation and application of the public purpose requirement in expropriation law in South Africa. See further BV Slade "Public purpose of public interest and third party transfers" (2014) 17 *Potchefstroom Electronic Law Journal* 167-612 where Slade discusses the difference between 'public purpose' and 'public interest'. It is generally accepted that public purpose is a narrower category than public interest and that the distinction between public purpose and public interest does not make any practical difference. See *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) para 82 in this regard. Furthermore, with regard to third party transfers (when the State expropriates property from one party and transfers it to a different party and is also known as a private to private transfer) for land reform purposes the author states that the public interest requirement would generally be satisfied. Importantly, to date there have been no challenges against the constitutionality of transferring expropriated property to third parties for land reform purposes.

to discuss this requirement further, because it is unlikely that the public interest requirement in section 25(2) will be interpreted so narrowly as to frustrate or impede expropriation for purposes of land reform.[184] Furthermore, this requirement will play a relatively insignificant role in light of Roux's predication about the telescoping or vortex effect of the *FNB*-methodology, as explained.[185]

2 7 3 Compensation

As the property clause is currently formulated,[186] section 25(3) provides for a framework within which the duty to compensate, the manner and time of payment and the amount of compensation for expropriation should be determined.[187] Specifically, the section provides that compensation in cases of expropriation has to be just and equitable.[188] Courts are thus enjoined to consider all of the factors listed in section 25(3)(a)-(e), namely: (a) the current use of the property; (b) the history of the acquisition and the use of the property; (c) the market value of the property; (d) the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the expropriation; and (e) the purpose of the expropriation. Accordingly, the Constitution does not make provision for compensation

[184] Van der Walt *Constitutional Property Law* 458. There is authority in South African law to the effect that the public purpose or public interest requirement should not be construed narrowly. See A Eisenberg "'Public purpose' and expropriation: Some comparative insights and the South African bill of rights" (1995) 11 *South African Journal on Human Rights* 207-221 which provides a useful overview. See further M Jacobs *The law of expropriation in South Africa* (1982) 15-16; Gildenhuys *Onteieningsreg* 89-92, 94-99 for pre-constitutional South African law.

[185] Roux "Property" in *CLOSA* 46-33-46-36.

[186] However, see Hoops (2019) *SALJ* 261-302; Ngukaitobi & Bishop "The Constitutionality of Expropriation without Compensation" <https://www.wits.ac.za> (accessed 02-08-2019); Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 66-75.

[187] E (WJ) du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 369-387; E (WJ) du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen (eds) *Rethinking Expropriation Law III: Fair Compensation* (2018); WJ du Plessis *Compensation for expropriation under the Constitution* LLD, Stellenbosch University (2009); Van der Walt *Constitutional Property Law* 503; Roux "Property" in *CLOSA* 46-33-46-36.

[188] Section 25(3) provides that "the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and the use of the property; (c) the market value of the property; (d) the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation". See also in general Van der Walt *Constitutional Property Law* 505-520; WJ du Plessis "Valuation in the constitutional era" (2015) 18 *Potchefstroom Electronic Law Journal* 1726-1759; J van Wyk "Compensation for land reform expropriation" (2017) *Tydskrif vir Suid-Afrikaanse Reg* 21-35.

at market value. Instead, it makes provision for "just and equitable" compensation in cases of expropriation[189] of which market value is only one factor.[190]

Therefore, in terms of sections 25(3)(a)-(e) it may possible, in suitable cases, that the expropriation may be just and equitable without any compensation.[191] However, it is clear that it would not be sufficient to consider one factor, such as the purpose of the expropriation, on its own to justify the absence of compensation.[192] Instead, all the relevant circumstances, including but not limited to those considerations listed in the Constitution, should be taken into account to determine what would constitute just and equitable compensation.[193]

2 8 If not, is the expropriation justified under section 36?

If the expropriation does not comply with one of the requirements discussed above, then the next step of the *FNB*-methodology is whether the expropriation can be justified under section 36 of the Constitution. As explained, Roux opines that this stage of the constitutional inquiry will only be reached in exceptional cases, if at all.[194] For example, a law providing for expropriation of property that is not aimed at achieving a public purpose or public interest will in all likelihood fail the arbitrariness test in section 25(1) and section 36 during the deprivation analysis.[195] Accordingly, it is not necessary to consider this step further.

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[189] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 369-387; Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* in general; See Du Plessis *Compensation for Expropriation under the Constitution* 300; Van Wyk (2017) *TSAR* 35.

[190] Pienaar *Land Reform* 250-251; Van der Walt *Constitutional Property Law* 512-520. See also Du Plessis (2015) *PELJ* 1726-1759. See furthermore, *Ex Parte Former Highlands Residents: In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35 where the court formulated a two-step approach for calculating compensation. In this regard, during the first step, market value is determined as the starting point in the application of section 25(3) of the Constitution. Thereafter amounts are subtracted or added to the amount of the market value as other relevant circumstances may require. See further *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) paras 72, 93-100 where this approach was also followed and *Baphiring Community v Uys* 2007 5 SA 585 (LCC) where the judge pointed out that the market value is but one of the items that must be taken into account as confirmed in *Uys v Msiza* 2018 3 SA 440 (SCA) paras 12-13.

[191] Van der Walt *Constitutional Property Law* 506.

[192] 506.

[193] Van der Walt *Constitutional Property Law* 506. See in general Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 369-387; Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* in general; Du Plessis *Compensation for Expropriation under the Constitution* 300; Van Wyk (2017) *TSAR* 35.

[194] Roux "Property" in *CLOSA* 46-36; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.

[195] Roux "Property" in *CLOSA* 46-36; Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in *Constitutional Conversations* 264-281.

3 The constitutionality of mechanisms for the regulation of agricultural land

3 1 Introduction

In line with the *FNB*-methodology set out above, the constitutionality of SALA and the Regulation Bill is analysed forthwith. Importantly, the focus of this section falls on the substantive and procedural arbitrariness of the regulatory provisions in SALA and the Regulation Bill in relation to (a) the restriction on subdivision of agricultural land; (b) the imposition of land ceilings; and (c) (i) the prohibition on foreigners to acquire any agricultural land; and (ii) the restrictions placed on foreigners in relation to the disposal of agricultural land.

3 2 Does that which is taken away or interfered with amount to property for purposes of section 25?

In terms of SALA and the Regulation Bill, the object is land, specifically agricultural land, which clearly constitutes property and enjoys protection under section 25.[196] Furthermore, SALA and the Regulation Bill specifically limit the rights of an agricultural land owner. The nature of the right affected in this regard is a real right in land, namely ownership.[197] Ownership entitlements (or incidents of ownership) constitute an interest in property for purposes of section 25 and therefore enjoys protection under the property clause.[198] Having established that both SALA and the Regulation Bill limit a property interest protected under section 25 of the Constitution, the next step of the *FNB*-methodology emerges.

3 3 Has there been a deprivation of such property?

In line with the wide definition in *FNB* and *Shoprite Checkers*, it is clear that the restrictions on the subdivision of agricultural land; the imposition of land ceilings on agricultural land; the prohibition against foreigners to acquire any agricultural land; and the restrictions imposed on foreigners with regard to the disposal of agricultural land amount to a deprivation of property. As SALA (and when promulgated, the Preservation Bill) prohibits the subdivision

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[196] Section 25(4)(b) of the Constitution of the Republic of South Africa, 1996 clearly states that "property is not limited to land". See also Van der Walt *Constitutional Property Law* 117.

[197] Frantz *Repealing the Subdivision of Agricultural Land Act* 98; Van der Walt *Constitutional Property Law* 118; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 33.

[198] In *Geyser v Msunduzi Muncipality* 2003 5 SA 18 (N) 37A-37B, the court held that "[t]he property that is protected under s 25 of the Constitution, includes property rights such as ownership and the bundle of rights that make up ownership." See further Roux "Property" in *CLOSA* 46-13; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 33.

of agricultural land without ministerial consent, it restricts the owner's right to freely use and dispose his or her property.[199] Accordingly, irrespective of whether the Minister provides consent for the subdivision, the deprivation occurs by virtue of the legislation that restricts the owner's ability to subdivide his/her agricultural land. Likewise, land ceilings in terms of the Regulation Bill and restrictions such as the right of first refusal granted to the State in cases where a foreign owner wishes to dispose of his or her property, limit the owner's right to freely use and dispose of his or her property.

In other words, the existence of these regulatory mechanisms clearly amount to legally significant interferences, because they restrict or interfere with a property holder's right to use, enjoy, exploit and dispose of property freely. However, a deprivation in itself is not unconstitutional – only where the deprivation amounts to an unauthorised or arbitrary deprivation will property rights be infringed. Consequently, the test as set out in *FNB* for determining whether a deprivation amounts to an arbitrary deprivation is applied below.

3 4 If there has been a deprivation, is such a deprivation consistent with the provisions of section 25(1)?

Having established that both SALA and the Regulation Bill limit a property interest protected under section 25 of the Constitution, the next step of the *FNB*-methodology emerges. In terms of section 25(1) a regulatory deprivation must be effected in terms of law of general application and may not be arbitrary.[200] These two requirements are discussed forthwith.

3 4 1 Law of general application

The nature of SALA as original legislation applies generally and does not single out an individual or group of individuals, but rather applies to all agricultural land owners. Accordingly, SALA constitutes, and the Preservation and Regulation Bills constitutes "law of general application".

Once promulgated, the Regulation Bill will, in principle, also apply to *all* agricultural land owners.[201] However, while the Regulation Bill applies to private and public agricultural land, it can be argued that the Regulation Bill will impact primarily on white agricultural land owners (citizens and foreigners), given the aim to redistribute agricultural land to Black

[199] Frantz *Repealing the Subdivision of Agricultural Land Act* 98.
[200] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[201] However, the aim is to redistribute land to Black persons.

persons in particular. Accordingly, the regulatory deprivations embodying the restrictions on subdivisions or the imposition of land ceilings on agricultural land, will be authorised in terms of legislation.

3 4 2 Substantive and procedural arbitrariness

Whether a sufficient reason for the deprivation exists will depend on the interplay of the factors or considerations and relationships identified by the Court in *FNB*.[202] These considerations should result in a determination of whether the reason for the deprivation would require a rational relationship between the means and end or whether a more burdensome and proportionate relationship between the means and ends should exist for the deprivation not to be arbitrary.[203] Accordingly, the provisions of SALA and the Preservation Bill must provide sufficient reason for their imposition and must be procedurally fair. Likewise, if the provisions of the Regulation Bill do not provide sufficient reason or are procedurally unfair, then the deprivation will be arbitrary and consequently unconstitutional. For this section, the restrictions on subdivision in terms of SALA; the imposition of land ceilings in terms of the Regulation Bill; and the prohibition or restrictions placed on foreigners to acquire and dispose of agricultural land will be discussed separately.

3 4 2 1 The constitutionality of restrictions on subdivision

3 4 2 1 1 Substantive arbitrariness

The first consideration is the relationship between the means employed and the ends sought to be achieved by SALA. As mentioned, SALA aims to prevent the fragmentation of agricultural land into uneconomic units in order to preserve prime agricultural land.[204] In determining whether the means are justified in achieving the aim, the way in which SALA is implemented must be taken into consideration. The mere existence of the prohibition on subdivision constitutes a deprivation of property. However, SALA does not impose an absolute prohibition on subdivision, as it attaches an application process which ensures that a proposed subdivision does not result in the uneconomic fragmentation of agricultural land. It may also be necessary, at this stage of the enquiry to consider whether the aim could be

[202] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[203] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(g).
[204] See Chapter 2, 2 and Chapter 3, 3 2 2 above.

achieved in an alternative way or whether the regulation of subdivision is the only way in which agricultural land can be preserved and conserved.

The second consideration is the relationship between the purpose and the person affected. The provision which places a prohibition on subdivision of agricultural land only affects the owner of agricultural land. Only the owner can make an application for subdivision to the Minister.

The next consideration is the relationship between the purpose of the deprivation, the nature of the property in question and the extent of the deprivation. The nature of the property is immovable and the nature of the right affected by SALA is a real right in land, namely ownership. In this regard, Ackerman J stated that if the property in question is ownership of *land*, "a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation".[205] According to Frantz, the fact that the deprivation affects *ownership* of agricultural land would require a proportionate, rather than a rational, relationship between the means employed and the ends sought to be achieved.[206] Where the purpose is land reform as envisaged in section 25(4) of the Constitution, then the relationship between the means employed and the ends achieved would require a rational, instead of a proportionate, relationship.

The extent of the deprivation and the effect of the prohibition on subdivision on the incidents of ownership of the land owner also have to be considered. SALA limits the right of disposal (specifically the right to subdivide and then sell, or to register a long-term lease; to register certain servitudes or to bequeath property). However, the deprivation does not limit all the incidents of ownership. The provisions of SALA only affect the right of disposal. Arguably, this consideration will not require a more compelling reason, because the deprivation only requires the owner to apply for subdivision before exercising the right to dispose of the agricultural land. Based on this consideration, the scale between rationality and proportionality may shift back to mere rationality.

Accordingly, based on the analysis of and interplay between the factors established in *FNB*, it can be concluded that a mere rational relationship between the means employed and the ends achieved would establish a sufficient reason. Arguably, the purpose of SALA is

[205] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[206] Frantz *Repealing the Subdivision of Agricultural Land Act* 104-105.

compelling enough to establish a rational nexus between the regulation of subdivision and the preservation of agricultural land. In conclusion, the effect of the prohibition on subdivision in terms of section 3 of SALA on the right of disposal is not substantively arbitrary and therefore constitutionally permissible.

3 4 2 1 2 Procedural arbitrariness

Having regard to the flexible-circumstance based standard laid out in *Mkontwana*,[207] and the relevant circumstances in *Reflect-All*,[208] SALA prohibits or limits the right to subdivide, subject to the application process set out in section 4. As explained above,[209] a decision taken by the Minister cannot be challenged in terms of procedural fairness under section 25, but should be approached in accordance with administrative law, specifically PAJA. In short, the decision (administrative action),[210] by the Minister to decline an application for subdivision will have to be reviewed internally[211] or be subjected to judicial review under section 6 of PAJA. Therefore, the imposition of restrictions on subdivision of agricultural land is not substantively or procedurally arbitrary, and thus constitutional.

3 4 2 2 The constitutionality of land ceilings

3 4 2 2 1 Substantive arbitrariness

The Regulation Bill regulates agricultural land by setting caps on the amount of agricultural land a person may own.[212] The parameters for determining the land ceiling are provided for in the Regulation Bill. Any holdings in excess of those ceilings will be regarded as

[207] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) paras 65-66.

[208] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) paras 46-47. The court in *Reflect-All* had to decide whether a deprivation affecting the use, enjoyment and exploitation would be procedurally unfair where it failed to consult individual owners on the proposed planning of provincial roads. The court found the claim of procedural arbitrariness had to fail because it would be *impractical*, *costly*, and *not in the public interest to require consultation with each and every property owner.*

[209] See 2 4 2 2 above.

[210] Section 1 of the Promotion of Administrative Justice Act 3 of 2000 which provides for a definition of "administrative action".

[211] Section 7(2)(b) of the Promotion of Administrative Justice Act 3 of 2000, which provides that no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. However, section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 states further that in exceptional circumstances and on application by the person concerned, such person may be exempted from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

[212] Clause 25 of the Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.

"redistribution agricultural land".[213] The owner of the redistribution agricultural land, irrespective of whether the owner is a foreigner or a citizen, must first offer the "redistribution agricultural land" for sale to Black persons[214] and thereafter to the Minister. In this regard, it is questioned whether the imposition of land ceilings in terms of the Regulation Bill amount to an arbitrary deprivation of property. Phrased differently: Would the Regulation Bill pass constitutional muster?

To determine whether there is sufficient reason for the deprivation of agricultural land, the relationship between the imposition of land ceilings (the means) and the redistributive aim (the ends) needs to be evaluated.[215] Whether a test for rationality or something closer to proportionality is required to determine whether a regulatory measure provides sufficient reason for the deprivation, will depend on the circumstances of the case. Again, the considerations listed in *FNB* emerge here.

In accordance with section 25(5) and 25(8) of the Constitution, the purpose or aim of the regulatory measure constituting a deprivation, as explained, is *inter alia* to obtain agricultural land for redistribution;[216] to redress the past imbalances in access to agricultural land;[217] and to promote food security.[218] The people affected by the imposition of land ceilings are all agricultural land owners[219] including natural or juristic persons (which include trusts). However, institutional funds[220] that own portions of agricultural land holdings which amount to "redistribution agricultural land" may apply for exemption from the Minister.[221]

[213] According to clause 1 of the Regulation of Agricultural Land Holdings Bill "redistribution agricultural land" is defined as "all agricultural land that falls between or exceeds any category of agricultural land holdings contemplated in section 25".
[214] As defined in the Employment Equity Act 55 of 1998, essentially being Indian, African and Coloured citizens.
[215] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[216] Clause 2(a) of the Regulation of Agricultural Land Holdings Bill.
[217] Clause 2(b) Regulation of Agricultural Land Holdings Bill.
[218] Clause 2(c) of the Regulation of Agricultural Land Holdings Bill.
[219] The definition list in clause 1 of the Regulation Bill provides that an owner is the person in whose name the land is registered.
[220] See the definition of institutional funds in the definition list of the Regulation of Agricultural Land Holdings Bill.
[221] Clause 26(4)(a) and (b) of the Regulation of Agricultural Land Holdings Bill read together.

The Regulation Bill affects immovable property, specifically all agricultural land. Accordingly, this requirement requires that a more compelling purpose will have to be established for a sufficient reason to exist.[222] Roux argues that one of the main exceptions to this rule may be the most controversial, namely "the deprivation of ownership rights in land in pursuit of land reform".[223] He furthermore argues that the:

> "normative force of the declaration in s[ection] 25(4)(a) that the public interest includes the nation's commitment to land reform; together with the attempted immunisation of land reform from constitutional impediment in s[ection] 25(8), *may* have the effect of lowering the level of scrutiny, even though the property in question is ownership of land" (my emphasis).[224]

In other words, where the purpose is land reform, the level of scrutiny may be lowered. Moreover, all the other factors also need to be considered to determine the level of scrutiny and to determine whether there is sufficient reason for the deprivation. Clearly, the nature of the property in question and the extent of the deprivation will have to be considered as well. Land reform programmes and regulatory measures have the potential to increase or decrease agricultural production.[225] Given the importance of agriculture and accordingly, the nature of the property, for food security, economic growth,[226] employment and poverty alleviation, the level of scrutiny may require something more than a simple rational connection between the means employed by the Regulation Bill and the land reform oriented goal envisaged by the Bill.

The extent of the deprivation will depend on a number of factors, including the size of the agricultural land holding (which will vary from district to district) and the ceiling imposed in terms of clause 25 of the Regulation Bill. Depending on the circumstances, it is possible that only a small portion of land becomes "redistribution land". While the exact size of the portion of the land that will be deprived of is uncertain at this point, it is clear that the agricultural land owner will be deprived of all of his, her or its ownership entitlements in relation to the

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[222] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(e).
[223] Roux "Property" in *CLOSA* 46-24.
[224] 46-24.
[225] M Weideman *Land reform, equity and growth in South Africa: A comparative analysis* PhD thesis, University of Witwatersrand (2006) 62.
[226] Weideman *Land reform, equity and growth in South Africa: A comparative analysis* 63 where the author states that "agriculture can contribute to economic development in four ways. Firstly, through product contribution, for example, food production. Secondly, through market contribution, for example, providing a market for produced goods. Thirdly, a factor contribution, for example providing employment and finally, a foreign capital contribution through export earnings".

relevant parcel of land. In other words, the deprivation, regardless of the size of the land holding, will embrace all the incidents of ownership. Arguably, this shifts the level of scrutiny required towards proportionality.

In light of the fact that the imposition of a land ceiling impacts primarily white agricultural land owners (although it is applicable to private and public agricultural land owners in principle); deprives the owner of immovable property, (specifically agricultural land which is important for food security and economic growth); and deprives the owner of *all* the incidents of ownership and having regard to the aims of the Regulation Bill, it may be argued that something more than a rationality analysis is required to determine whether there is sufficient reason for the deprivation. Accordingly, depending on the particular circumstances of each case, a rational or proportional connection between the imposition of land ceilings and the aim of the Regulation Bill may be required.

In other words, in some cases, depending on the size of the land and the ceiling imposed per district, it may be sufficient for the evaluation to focus on rationality, while in other cases a proportionality analysis may be required. If, for example, an agricultural land owner is deprived of (almost) all his or her agricultural land, then it will have to be determined whether there is a proportional relationship between the means employed and the ends sought to be achieved. If this is the case, then the elements of proportionality, namely (a) legitimacy;[227] (b) suitability;[228] (c) necessity[229] and (d) fair balance[230] need to be considered.

Firstly, with regard to the element of legitimacy, it is clear that the Regulation Bill pursues a legitimate (and constitutional) aim, namely to bring about equitable access to land in line with the mandate in the Constitution[231] by redressing the past imbalances in access to agricultural land and promoting food security. Secondly, with regard to the element of suitability, it may be questionable whether the Regulation Bill is capable of achieving its aims. In this regard, it is highly unlikely that the Bill would be able to redistribute land *and* ensure food security. The aims of the Regulation Bill may be regarded as “overreaching”, because there are no mechanisms in the Regulation Bill that provide for the support of

[227] Does the regulatory measure in question pursue a legitimate aim?
[228] Is the regulatory measure in question capable of achieving the legitimate aim?
[229] Is the regulatory measure the least intrusive means of realising the legitimate aim?
[230] Does the regulatory measure represent a net gain when the reduction in enjoyment of rights is weighed against the level of realisation of the legitimate aim?
[231] Section 25(5) of the Constitution of the Republic of South Africa, 1996.

beneficiaries once the agricultural land has been redistributed. Nor are there specific provisions in the Bill that promote and ensure food security. Thirdly, with regard to the element of necessity, it is questionable whether the imposition of land ceilings is the least intrusive (and most effective) means of realising these legitimate aims. Instead, it may be necessary to explore other redistributive regulatory mechanisms. Lastly, given the analysis of the suitability and necessity of the regulatory measure, the realisation of the aim of the Regulation Bill may outweigh the complete deprivation of all ownership incidents.

Accordingly, a law that authorises an excessive burden on one individual or a small group of individuals (white agricultural land owners) could be arbitrary and invalid, even though it serves a legitimate, important and even constitutionally enshrined public purpose or public interest.[232] To illustrate, a distinction can be drawn between cases where the aim of the regulatory measure is land reform and where it is not. On the one hand, where a law places an excessive burden on the owner or completely deprives the owner of all his or her rights in land and is not effected in pursuit of land reform or other reforms aimed at broadening access to land, it is unlikely to pass constitutional muster. In such cases, Roux argues that the deprivation will amount to an expropriation.[233] On the other hand, where a law places an excessive burden on the owner or completely deprives the owner of all his or her rights in land in pursuit of land reform, then the law is unlikely to be found unconstitutional.[234] In this regard, Bezuidenhout argues that:

> "Deprivation that results in an excessively harsh regulatory burden for one or a small group of property owners will probably be substantively arbitrary and in conflict with section 25(1). Courts generally declare unconstitutional regulatory interferences with property rights invalid. However, invalidating legitimate regulatory measures that are otherwise lawful purely because they impose a harsh and excessive burden on some property owners may not always be justified if the regulatory measure fulfils an important regulatory purpose".[235]

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[232] Van der Walt *Constitutional Property Law* 214.
[233] Roux "Property" in *CLOSA* 46-24 – 46-25.
[234] 46-24 – 46-25.
[235] K Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state action* LLD, Stellenbosch University (2015) 3. The author investigates the appropriateness of alternative solutions to invalidating otherwise lawful and legitimate but excessive regulatory deprivations of property. The goal of the dissertation is to identify remedies that allow courts to uphold the regulatory measure and simultaneously balance out the excessive regulatory burden it imposes on property owners, such as the payment of equalisation payments. Another alternative solution as suggested by Roux "Property" in *CLOSA* 46-24 – 46-25 is to transform the excessive regulatory measure into expropriation and require the State to pay compensation to the affected owner. This approach is referred to as constructive expropriation. However, in view of the *FNB*-methodology and the wording of section 25 it seems unlikely that the court will adopt constructive expropriation as a solution.

In conclusion, the imposition of land ceilings may in some cases, depending on the size of the agricultural land holding and the ceiling imposed per district, may cause a harsh and excessive regulatory burden on agricultural land owners which will result in an arbitrary deprivation of property. In other cases, it may be that the deprivation is rational or proportionate. However, as the aim of the Regulation Bill is to promote land reform and broadening access to land, it will according to Roux, be unlikely to be found unconstitutional.[236] He argues that this aim will in all likelihood outweigh the protection of private property rights. In such cases, Roux argues that the excessive regulatory measure should be transformed into and expropriation which requires the State to pay compensation to the affected owner.[237]

However, in view of the *FNB*-methodology and the wording of section 25 it seems unlikely that the court will adopt constructive expropriation as a solution. Therefore Bezuidenhout suggests that, where it is not suitable to declare legislation invalid in light of the important regulatory purpose i.e. land reform that it aims to fulfil, land owners should be compensated for the deprivation.[238]

Accordingly, it may be better, in accordance with Van der Walt's adjusted or amended *FNB*-methodology, to consider from the outset whether the imposition of the land ceiling amounts to a deprivation or an expropriation.[239] Depending on the circumstances of each case, the imposition of land ceilings per district may be substantively arbitrary. The constitutionality of land ceilings will have to be determined on a case-by-case basis, district per district, having regard to all the factors, criteria and circumstances of the case.

3 4 2 2 2 Procedural arbitrariness

Clauses 25(1) and 25(3) of the Regulation Bill provides that the Minister must not only consult with the Land Commission and the Minister responsible for agriculture before determining the ceilings for each district, but he or she must also publish a draft of the proposed ceiling determination in the *Government Gazette* and in the media circulating nationally and in the relevant district. Such a notification must also call upon interested persons (such as agricultural land owners) to comment on the draft in writing. Interested

[236] Roux "Property" in *CLOSA* 46-24 – 46-25.
[237] 46-24 – 46-25.
[238] Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state* 3. She proposes that compensation should amount to equalisation payments in such cases.
[239] See 4 below.

persons must make comments within a period not less than 30 days from the date of publication of the notice. Because land owners are afforded the opportunity to be heard during the decision-making process,[240] it is likely that the Regulation Bill is procedurally fair.

However, if the land owner wishes to challenge the administrative decision (the determination of the ceiling itself), made by the Minister, he or she will have to rely on the remedies available in PAJA.[241] Interestingly, the Bill does not *prima facie* provide for periodic review of the legislative framework. For example, it is unclear whether it is possible to adjust the ceiling in light of changing criteria and factors periodically. It seems quite drastic to establish a ceiling once-off, without providing for adjustments in future. In this regard, the Bill may be procedurally unfair. However, this concern can easily be addressed if the Minister has the power to change a ceiling by notice in the *Gazette,* which he or she arguably has. Accordingly, the Regulation Bill is *prima facie* procedurally fair and is therefore constitutionally sound in this respect. Despite being procedurally fair and constitutional, it is questionable whether the complexity of such a framework with corresponding and fluctuating parameters will be effective in light of the aims of the redistribution programme.[242]

3 4 2 3 The constitutionality of restrictions on the acquisition and disposal of agricultural land by foreigners

3 4 2 3 1 Substantive arbitrariness

Globally, laws on foreign ownership of agricultural land vary widely, ranging from prohibiting foreign ownership outright, to restrictions on the size of land a foreigner may hold, to no restrictions at all.[243] As mentioned in Chapter 3,[244] South Africa, at the start of the new constitutional dispensation, followed an approach to land where access is possible, for all persons, in principle.[245] This approach can by characterised as an open, unlimited market approach, which does not prescribe the amount of (agricultural) land a citizen or foreign person or entity may own.[246] In principle, access to land is unrestricted, but subject to the

[240] Klaaren & Penfold "Just Administrative Action" in *CLOSA* ch 63-81. The common-law rules of natural justice, embody this principle because it ensures that people adversely affected by decisions would know about such decisions and would be able to participate in the decision-making process, and would be provided with the opportunity to state their case. See Quinot (ed) *Administrative Justice in South Africa* 147-148 in this regard.
[241] Van der Walt (2012) *Stell LR* 91-92; Van der Sijde *Reconsidering the relationship between property and regulation* 124.
[242] See Chapter 6, 3 below.
[243] Pienaar *Land Reform* 276-285.
[244] See Chapter 3, 3 4 above.
[245] JM Pienaar "Land Reform: January to March" (2017) 1-8 1. See also Pienaar *Land Reform* 276-280 for more background on global approaches to access to land.
[246] Pienaar *Land Reform* 370.

imperative set out in section 25(5) of the Constitution in that the State has a duty to take necessary steps to broaden access to land for citizens specifically.[247] Therefore, the regulation of access to land for non-citizens is in principle constitutionally based. In line with this duty, the State aims to broaden access to land for citizens by (a) restricting the amount of agricultural land any person, citizen or foreigner, may own by way of land ceilings;[248] (b) restricting foreigners from acquiring ownership of agricultural land in future as provided for in the Regulation Bill;[249] and (c) restricting the disposal of agricultural land by foreigners.[250] The constitutionality of land ceilings on citizens and foreign persons were already dealt with above.[251] It is questioned whether the restrictions on foreigners to (a) acquire; and (b) dispose of agricultural land in terms of the Regulation Bill amount to an arbitrary deprivation of property. The prohibition to acquire agricultural land is dealt with first.

Section 25(1) only protects *existing* property rights[252] and does not guarantee private property as such. Instead, it sets out the parameters within which the government can interfere with private property rights, as explained. In terms of the Regulation Bill, foreign persons[253] will not be able to own land in freehold "from the time the policy is passed into law",[254] i.e. the proposed Bill will not apply retrospectively and those who have already acquired ownership (freehold) will not have their tenure changed by the passing of the proposed legislation. While current foreign persons will still have ownership over agricultural land, their ownership will still be restricted in terms of the amount of agricultural land they may own.[255] After the promulgation of the Regulation Bill, foreign persons will not be allowed to acquire agricultural land. Instead, foreign persons will be eligible for long-term leases, which must be registered,[256] for the duration of 30 to 50 years.[257] Accordingly, those foreign persons who acquired agricultural land before the commencement of the Act will enjoy the protection

[247] Pienaar (2017) *JQR* 2.
[248] See Chapter 3, 3 3 above.
[249] Clauses 19 and 20 of the Regulation of Agricultural Land Holdings Bill.
[250] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[251] See 3 4 2 2 above.
[252] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 50.
[253] Foreign person has a specific definition in terms of the Regulation Bill. See clause 1 where the definition of "foreign person" in terms of the Regulation of Agricultural Land Holdings Bill 2017 is set out. For example, in terms of clause 19(2) the prohibition against the acquisition of agricultural land does not apply to agricultural land that is acquired by a foreign person where a black person as defined in the Employment Equity Act 55 of 1998 has a controlling interest in a company.
[254] Clause 19(1) of the Regulation of Agricultural Land Holdings Bill.
[255] See Chapter 3, 3 4 above.
[256] Clause 20 of the Regulation of Agricultural Land Holdings Bill.
[257] Clause 20 of the Regulation of Agricultural Land Holdings Bill.

afforded in section 25(1), whereas foreign persons wanting to acquire agricultural land after the commencement of the Act will not.[258]

Therefore, the Regulation Bill does not aim to deprive or extinguish a foreign person's ownership of agricultural land. The prohibition on the acquisition of agricultural land by foreigners does not infringe the right to property and therefore section 25(1) is not applicable. Accordingly, the constitutionality of the prohibition against the acquisition of agricultural land by foreigners cannot be tested against section 25(1) of the Constitution and the considerations in the *FNB* analysis do not have a role to play here.

The Regulation Bill does however restrict the disposal of agricultural land by foreign persons specifically.[259] It provides that a foreign person disposing of ownership of an agricultural land holding, must first offer the land to the Minister. In this regard, the Minister has a right of first refusal to purchase the agricultural land. Where the Minister does not wish to acquire the land, the foreign person must make the land available for acquisition to citizens. The test set out in *FNB* will be used to determine whether the restriction on the disposal of agricultural land is constitutional, by considering each step. This requires an evaluation of the relationship between the means employed, the disposal restrictions and the ends sought (broadening access to land) to be achieved.[260]

It is clear that the restriction to dispose of agricultural land applies to all foreign owners. Furthermore, the nature of the property is immovable, specifically agricultural land, which is significant for, *inter alia*, promoting food security and economic growth. Again, where the property in question is ownership of land, a compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation.[261] In this regard, the regulatory measures aim to broaden access to land for land reform or redistribution purposes as envisaged in the Constitution. In this light the level of scrutiny will probably amount to something closer to rationality.

Furthermore, with regard to the extent of the deprivation, the deprivation does not deprive the foreign owner of all of his rights in land. The restriction only affects the foreign owner's

[258] Clause 19(1) of the Regulation of Agricultural Land Holdings Bill.
[259] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[260] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.
[261] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100; Roux "Property" in *CLOSA* 46-24.

right to dispose of his property as he wishes. The Regulation Bill specifically sets out the process for disposal of agricultural land by a foreigner.[262] Therefore, the restriction only proscribes *how* the owner is to dispose of his property. The owner is thus only prevented from disposing of his property, to a buyer of his choice. Because only one incident of ownership is affected by the Regulation Bill, the evaluation will only require a rational relationship between the means employed and the aim sought to be realised. The restrictions imposed on the foreigner to dispose of his property, i.e. to grant the Minister a right of first refusal, seem rational. The more land the Minister can acquire, the more land will be available in principle to realise the constitutional mandate to broaden access to land for citizens. Inevitably these actions are endorsed by and aligned with section 25(4)(a) of the Constitution.

Accordingly, where only one entitlement or some entitlements only are affected and the impact of the law does not impose a disproportionate burden on those affected when weighed against the purpose sought to be achieved, especially where the purpose of the law is land reform, then the law will in all likelihood be found to be constitutional.[263] In this light, there is seemingly sufficient reason for the deprivation. Therefore, the restriction on the disposal of agricultural land by foreigners is non-arbitrary and constitutional.

3 4 2 2 2 Procedural arbitrariness

Similar to the argument for procedural fairness in terms of SALA,[264] the Regulation Bill does not place an absolute prohibition on the disposal of agricultural land. Instead, the foreign person is only restricted in his choice of buyer, as explained above. Where the State does not intend to or does not in fact acquire the agricultural land from the foreigner, the foreign person will be free to sell his or her property to any Black South African citizen.[265] The process in the Regulation Bill serves as a procedural safeguard, similar to the application process for subdivision in SALA.[266] Therefore, the imposition of restrictions on the disposal of agricultural land by a foreign person in terms of the Regulation Bill is neither substantively, nor procedurally arbitrary and therefore constitutional. Hence, all the regulatory mechanisms discussed are constitutional. It is therefore not necessary to determine whether the

[262] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[263] Roux “Property” in *CLOSA* 46-24-46-25.
[264] See 3 4 2 1 2 above.
[265] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[266] Frantz *Repealing the Subdivision of Agricultural Land Act* 101-102.

deprivation is justified in terms of section 36 of the Constitution in accordance with the *FNB*-methodology.

3 5 Does the deprivation amount to an expropriation in terms of section 25(2) of the Constitution?

Despite passing scrutiny under section 25(1) and/or under section 36(1), it still needs to be determined whether the provisions in terms of SALA and the Regulation Bill amount to an expropriation. If it does, the deprivation must also comply with the requirements of section 25(2)(a) and (b) of the Constitution. Each of the regulatory measures will be dealt with briefly below.

Based on the requirement of State acquisition, it is clear that the prohibition to subdivide agricultural land in terms of SALA at no point provides for or results in the acquisition of said agricultural land by the State. Accordingly, the restriction on subdivision does not amount to an expropriation. Depending on the acquisition method used by the State, the "redistribution agricultural land" acquired by the State may result in an expropriation.[267] Furthermore, the prohibition on the acquisition of agricultural land by foreign persons is clearly a regulatory measure and does not allow for the expropriation of agricultural land owned by foreigners.

Interestingly, in terms of the Regulation Bill, a foreigner disposing of ownership of agricultural land *must* first offer the Minister a right of first refusal to acquire ownership thereof.[268] In this regard, the right of first refusal offered to the Minister means that the State will have to make use of market-led approaches to acquire the property. However, in cases where an offer to purchase is not accepted by the foreign person, the State may still, in principle, expropriate the property.

Moreover, a foreign person or citizen wanting to dispose of any redistribution agricultural land, must first offer it to Black persons.[269] Only where no Black person acquires the redistribution agricultural land, shall the Minister acquire the land.[270] In this regard, the Regulation Bill makes provision for expropriation specifically, if the owner of the redistribution agricultural land and the Minister are unable to reach an agreement on the purchase price.[271] Accordingly, in such cases the expropriation of agricultural land will have

[267] *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) paras 48, 58.
[268] Clause 21(1) of the Regulation of Agricultural Land Holdings Bill.
[269] Clause 26(2) of the Regulation of Agricultural Land Holdings Bill.
[270] Clause 26(2)(b) of the Regulation of Agricultural Land Holdings Bill.
[271] Clause 26(2)(c) of the Regulation of Agricultural Land Holdings Bill.

to comply with the requirements set out in section 25(2)(a) and (b) of the Constitution.[272] Expropriation as an approach to acquiring agricultural land, and the requirements for an expropriation, are discussed in more detail in Chapter 5.[273]

4 Reflection

Upon reflection of the *FNB*-methodology, it is clear that it may be difficult, in some cases, to determine whether the imposition of a land ceiling amounts to an arbitrary deprivation of property. Depending on the specific ceiling and the corresponding size of the agricultural land holding it may seem like the deprivation (in the form of the implementation of a land ceiling) places an excessively harsh regulatory burden on a small group of persons, namely agricultural land owners. Where this is the case, the regulatory measure may be substantively arbitrary and in conflict with section 25(1). Bezuidenhout points out that in such cases:

> "invalidating legitimate regulatory measures that are otherwise lawful purely because they impose a harsh and excessive burden on some property owners may not always be justified if the regulatory measure fulfils an important regulatory purpose".[274]

Some regulations, such as land ceilings, should arguably be saved from invalidity in light of the constitutional mandate to broaden access to land. In such cases, as Bezuidenhout argues, compensation should be given to soften the effect of the excessive regulation.[275] Alternatively, Roux suggests that the deprivation should be treated as an expropriation for which compensation is payable.[276]

As the Regulation Bill is currently formulated, it may be unclear whether the regulatory measure constitutes a deprivation or expropriation of property, since the regulatory measure (the imposition of land ceilings) may, in some cases, require the State to acquire the "redistribution agricultural land" by way of expropriation.[277] To avoid confusion, Van der Walt

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[272] *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) paras 48, 58.
[273] See Chapter 5, 3 below.
[274] Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state action* 3; Van der Walt *Constitutional Property Law* 350; BV Slade "Compensation for What? An Analysis of the Outcome in *Arun Property Development (PTY) LTD v Cape Town City*" (2016) 19 *Potchefstroom Electronic Law Journal* 2-25, 4.
[275] For example, Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state action* argues for the use of the payment of equalisation payments may soften the excessive impact of the regulatory measure.
[276] Roux "Property" in *CLOSA* 46-24 – 46-25.
[277] Clause 26(2)(b) of the Regulation of Agricultural Land Holdings Bill. See Chapter 5, 3 below.

has proposed an adapted form of the *FNB* methodology.[278] The adapted version of the *FNB* methodology provides for the following steps or questions:

> "1. Beneficiaries: Is the complainant a beneficiary of section 25 protection?
> 2. Property: is the alleged property interest constitutional property for purposes of section 25?
> 3. Deprivation or expropriation: is the alleged interference with the protected property interest:
> a. a deprivation of property covered by section 25(1)?
> b. an expropriation of property covered by section 25(2)-(3)?
> 4a. Deprivation: if the interference is a deprivation of property, is it:
> a. authorised by law of general application?
> b. if it is authorised by law of general application, does the law permit arbitrary deprivation of property?
> 4b. Expropriation: if the interference is an expropriation, is the expropriation:
> a. authorised by law of general application?
> b. for a public purpose or in the public interest?
> c. accompanied by provision of just and equitable compensation?
> 5. Justification: if the law of general application
> a. permits arbitrary deprivation of property [or]
> b. authorises expropriation without providing for just and equitable compensation is, it justifiable in terms of section 36(1)?".[279]

In terms of Van der Walt's suggested methodology it is determined from the outset whether the measure constitutes a deprivation or expropriation of property. While it may be that the same conclusion is reached, when analysing whether the imposition of a land ceiling amounts to a deprivation or an expropriation, it shortens the inquiry considerably. The adapted *FNB*-methodology also avoids Roux's arbitrariness vortex to a certain extent. The stages of the original *FNB*-methodology dealing with whether the mechanism in question is a law of general application and the limitation analysis in terms of section 36 under both the determination of a deprivation and an expropriation, is dealt with only once in terms of the adapted *FNB*-methodology. Accordingly, Van der Walt's adapted version of the *FNB*-methodology may be more appropriate to deal with the constitutionality of regulatory mechanisms such as the restrictions on subdivisions; the imposition of land ceilings; and the restrictions on foreigners to acquire and dispose of agricultural land.

[278] Van der Walt (2016) *TSAR* 616-617.
[279] Van der Walt (2016) *TSAR* 616-617.

5 Conclusion

This Chapter set out to determine whether the imposition of regulatory measures, specifically (a) restrictions on the subdivision of agricultural land; (b) limiting the amount of land any person may own; and (c) restrictions imposed on foreigners in relation to the disposal and acquisition of agricultural land, is constitutional. The constitutionality of the mechanisms is evaluated in light of the *FNB*-methodology. While it is acknowledged that the *FNB*-methodology has not been without critique, it is still regarded as authoritative precedent for determining whether there has been a constitutional infringement of property rights in terms of section 25 of the Constitution. Each step or question of the methodology is set out and discussed. Subsequently, each regulatory measure is analysed to determine whether it complies with the requirements of the *FNB*-methodology to establish whether it is constitutional.

With regard to the first step (or question), it was found that the object in terms of all the regulatory mechanisms is land, specifically agricultural land, which clearly constitutes property and enjoys protection under section 25. In terms of the second question, whether there has been a deprivation of property, it was found that the implementation of the regulatory measures amounted to a deprivation of property, regardless of whether a wide or narrow interpretation of deprivation is followed. Consequently, the next step, requires one to determine whether the deprivation complies with the requirements of section 25(1). In this regard, it must be determined whether the deprivation took place in terms of law of general application and whether the deprivation amounts to an arbitrary deprivation. It was accepted that the SALA and the Regulation Bill constitute law of general application. The Constitutional Court in *FNB* determined that "a deprivation of property is 'arbitrary' as meant in section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the deprivation in question or [it] is procedurally unfair."[280] The considerations to determine substantive and procedural arbitrariness were consequently outlined. However, the determination of the arbitrariness of each regulatory mechanism necessitated a separate exploration because of the extensive analysis in terms of the substantive and procedural arbitrariness question.

[280] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100; Van der Walt (2012) *Stell LR* 88.

The question whether the arbitrary deprivation of property can be justified under section 36 of the Constitution was not discussed, because it was accepted that the same considerations (or factors) considered under the arbitrariness question will come into play when dealing with this question. In order to avoid repetition, this step was thus not elaborated on and applied.

Where the deprivation is not arbitrary, it still needs to be considered whether the deprivation amounts to an expropriation of property. In this regard, expropriations are regarded as a subset of a deprivation. It was found that the restrictions on subdivision and the restrictions on the acquisition and disposal of agricultural land by foreigners did not amount to an expropriation. However, when dealing with the imposition of land ceilings, the Regulation Bill expressly provides for the expropriation of "redistribution agricultural land" in some cases. In such cases, the expropriation of the agricultural land will have to comply with the requirements set out in the next step of the *FNB*-methodology. The expropriation must be effected in terms of law of general application; it must serve a public purpose or public interest; and it must provide for the payment of just and equitable compensation. Again, for the same reasons mentioned above, the question whether the expropriation was justifiable under the limitation clause of the Constitution, was unnecessary.

Once all the steps of the *FNB*-methodology were discussed, the focus fell on the determination of the substantive and procedural arbitrariness of the regulatory measures. In terms of the analysis of the substantive arbitrariness of the restrictions on subdivision, it was concluded that the level of scrutiny amounted to rationality. In this regard it was established that the restrictions were rationally connected to the aim of the legislation. This concludes that there is sufficient reason for the deprivation. Furthermore, with regard to the procedural arbitrariness, the restrictions imposed on the agricultural land owner's right to dispose of his or her property were found to be procedurally fair. In this light the implementation of restrictions on subdivision does not amount to an arbitrary deprivation of property and is therefore constitutional.

Given the analysis of the considerations listed in *FNB*,[281] the substantive arbitrariness analysis for the imposition of land ceilings may require a level of scrutiny that resembles a proportionality analysis. The elements of proportionality, namely legitimacy; suitability; necessity; and fair balance were considered in this regard. It was argued and established

[281] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

that in some cases, given the size of the agricultural land holding and the ceiling imposed thereon *inter alia*, the implementation of the regulatory mechanism may amount to an arbitrary deprivation of property, because there would not be a proportional balance between the regulatory measure and the aim sought to be achieved. However, in light of the fact that (a) land reform is constitutionally mandated; and (b) that land reform may be immunised from constitutional impediment in section 25(8), the implementation of the Regulation Bill is likely to pass constitutional muster. Because the Regulation Bill will be promulgated to give effect to section 25(5) of the Constitution, it will in all likelihood be found to be substantively non-arbitrary. Furthermore, it was also found that the determination and consequently the implementation of land ceilings, are procedurally fair. Accordingly, the implementation of land ceilings in all likelihood does not amount to an arbitrary deprivation of property and is therefore constitutional.

Whether the restrictions on foreigners to (a) acquire and (b) dispose of agricultural land, amount to an arbitrary deprivation of property was dealt with separately. In terms of the prohibition to acquire agricultural land once the Regulation Bill is promulgated, it was established that the protection of section 25 does not apply, because it only protects existing property rights. The prohibition against the acquisition of agricultural land could therefore not be tested against any of the stages of the *FNB*-methodology. In terms of the restrictions on the disposal of agricultural land by foreigners it was found that the level of scrutiny, given the considerations listed in *FNB*, was something closer to rationality. The extent of the deprivation only affects the foreign owner's right to dispose of his or her property partially. The owner can still dispose of the property, but to whom he or she can dispose the property is determined by the Regulation Bill. Weighed against the constitutional mandate in section 25(5), the deprivation was found to be substantively non-arbitrary, because sufficient (and a constitutional) reason is specifically provided. In other words, there is a rational connection between the implementation of the restriction and the aim of the Regulation Bill. The restrictions were also found to be procedurally fair. Consequently, the restriction on foreigners to dispose of agricultural land is constitutional.

Where the regulatory measures do not amount to an arbitrary deprivation of property, they may amount to an expropriation of property. The approach to acquiring agricultural land by way of expropriation and the requirements for a valid expropriation are dealt with in Chapter 5 and do not form the focus of this Chapter.

Chapter 5: Approaches to the acquisition of agricultural land in South Africa

1 Introduction

Since embarking on an all-encompassing land reform programme, one of the most contentious issues that confronted the South African government was the acquisition and transferral of sufficiently suitable land, on a large scale, in an affordable and sustainable manner.[1] In this regard, both State-owned and privately owned land may be available for redistribution. However, the manner of acquiring the land, specifically agricultural land, may differ depending on whether it is State-owned land or private land. For example, where State-owned land is already in the hands of the State to redistribute, land may have to be transferred from one department or Minister to another before it may be redistributed to the intended beneficiaries. Such a process will not involve market-led approaches or expropriation. However, where privately owned land has to be acquired for redistribution purposes, different acquisition approaches, including market-led approaches and expropriation, may be used. The focus, for purposes of this Chapter, falls on the different ways of acquiring *private* agricultural land for redistribution.

In South Africa, the basic approach to the acquisition of private land was directly linked to the peaceful political transition which resulted in negotiated, market-led or market-assisted land reform, founded on the willing-buyer-willing-seller ("WBWS") principle.[2] This was reflected in section 25 of the Constitution in terms of which existing property rights were protected but embedded within a constitutional land reform programme.[3] Coupled with these considerations, was the importance of international investment confidence in a new

[1] JM Pienaar *Land Reform* (2014) 226, 360.
[2] Pienaar *Land Reform* 249, 819-820. See further R Hall "Who, what, where, how, why? Many disagreements about land redistribution in South Africa" in B Cousins & C Walker (eds) *Land Divided, Land Restored* (2015) 127-144, 134-135; E Lahiff, SM Borras Jr & C Kay "Market-led agrarian reform: Policies, performance and prospects" (2007) 28 *Third World Quarterly* 1417-1436, 1420; SRA Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* LLM thesis, University of Cape Town (2014) 27; M Aliber & R Mokoena "The interaction between the land redistribution programme and the land market in South Africa: A perspective on the willing-buyer/willing seller approach" (2002) *Land reform and agrarian change in Southern Africa: An occasional paper series* Programme for Land and Agrarian Studies 1-45, 2.
[3] Pienaar *Land Reform* 249. See further Hall "Who, what, where, how, why? Many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 134-135; Lahiff, Borras Jr & Kay (2007)*Third World Quarterly* 1420; Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* 27; Aliber & Mokoena (2002) *Land reform and agrarian change in Southern Africa: An occasional paper series* 2.

democratic South Africa.[4] Inevitably, a market-led approach to land acquisition, which underpinned the redistribution programme was chosen and followed.[5] To the extent that the WBWS principle may have caused price hikes, making a market-based approach to land reform expensive and potentially unaffordable and unsustainable,[6] the political pressure[7] necessitated an increase in the rate of making land available for land reform purposes, of better quality, at a faster rate and at affordable prices.[8] Subsequently, the Policy Framework for Land Acquisition and Land Valuation published in 2012[9] proposed, *inter alia*, that the South African government should abolish the WBWS principle, while making more use of expropriation as a means or approach of acquiring land.[10]

Despite adjusting the expropriation paradigm to bring it in line with the Constitution and the objectives linked to land reform,[11] by way of, *inter alia* drafting a new Draft Expropriation Bill,[12] the State may have neglected to use its expropriation powers stringently. However, in light of recent developments,[13] which may result in an amended property clause that authorises expropriation without compensation,[14] the State may be poised to utilise these powers more in future.

Accordingly, in light of these developments there are various approaches to acquiring private agricultural land, including (a) market-led approaches (based on the WBWS principle); (b)

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[4] Hall "Who, what, where, how, why? Many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 134-135; Lahiff, Borras Jr & Kay (2007) *Third World Quarterly* 1420; Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* 27; H Binswanger & K Deininger "South African land policy: The legacy of history and current options" in J van Zyl, J Kirsten and HP Binswanger (eds) *Agricultural Land Reform in South Africa: Policies, Markets and Mechanisms* (1996) 64-103; T Kepe & R Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 26-06-2018) 7-8.

[5] Pienaar *Land Reform* 249. See 2 below for a discussion of market-led approaches.

[6] Pienaar *Land Reform* 226, 360.

[7] The government set a target to redistribute 30% of agricultural land by 2014. However, in terms of the Department of Rural Development and Land Reform *Annual Report 2013/14* 10, only about 4.2 million hectares have been transferred since 1994. For a discussion of the problems setting "targets" see Chapter 6, 2 2 below.

[8] JM Pienaar "Willing-seller-willing-buyer and expropriations as land reform tools: What can South Africa learn from the Namibian experience?" (2018) 10 *Namibian Law Journal* 41-64.

[9] Department of Rural Development and Land Reform *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment of the Office of the Valuer-General* (18 October 2012).

[10] Pienaar *Land Reform* 250. See 3 2 3 2 and 3 2 3 5 below where the Property Valuation Act 17 of 2014 and the role of the Valuer-General are discussed.

[11] Property Valuation Act 17 of 2014. See 3 2 3 5 below.

[12] The Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018. See 3 4 3 4 below.

[13] See 3 3 below.

[14] Clause 12(3) of the Draft Expropriation Bill B-2019 at 3 2 3 4 below refers to expropriation without compensation.

expropriation (with or without compensation); and (c) confiscation. This Chapter provides an overview of each of these approaches with the aim of establishing which approach or approaches may be regarded as the most suitable for the acquisition and redistribution of agricultural land in light of land reform imperatives. The suitability of the approach is discussed in Chapter 6 below.[15] In this regard, suitability encompasses a number of factors or criteria, including (a) the constitutionality; (b) the efficacy; (c) the affordability and (d) the outcome of the approach.[16]

2 Market-led approaches

2 1 Introduction

Since embarking on the land reform programme, the South African government opted for a market-based[17] or market-assisted approach[18] for the acquisition of land,[19] which was also actively promoted by the World Bank.[20] The market-based approach advanced by the World Bank in the early 1990's[21] essentially promoted State-assisted land purchase and transfer of title to beneficiaries as key elements for acquisition and redistribution of land.[22] This approach was based on the WBWS principle[23] as confirmed in the *White Paper on South African Land Policy*[24] ("*White Paper*") which specifically provided that:

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[15] See Chapter 6, 4 below.
[16] See Chapter 6, 4 below.
[17] Aliber & Mokoena (2002) *Land reform and agrarian change in Southern Africa: An occasional paper series* 2.
[18] Aliber & Mokoena (2002) *Land reform and agrarian change in Southern Africa: An occasional paper series* 2. This approach is also known as "market led agrarian reform" or negotiated land reform.
[19] Pienaar *Land Reform* 226; E Lahiff "Willing Buyer, Willing Seller: South Africa's failed experiment in market-led agrarian reform" (2007) *Third World Quarterly* 1577; Lahiff, Borras Jr & Kay (2007) 28 *Third World Quarterly* 1417-1418.
[20] Hall "Who, what, where, how, why? Many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 134-135; Lahiff, Borras Jr & Kay (2007) *Third World Quarterly* 1420; Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* 27.
[21] Binswanger & Deininger "South African land policy: The legacy of history and current options" in *Agricultural Land Reform in South Africa: Policies, Markets and Mechanisms* 64-103; Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 16.
[22] R Hall & T Kepe "Elite capture and state neglect: new evidence on South Africa's and reform" (2017) *Review of African Political Economy* 1-9, 2; Department of Land Affairs, *White Paper on South African Land Policy* (1997).
[23] Interestingly, the concept of willing buyer willing seller was entirely absent from the ANC's *Ready to Govern* policy statement of 1992 and also from the *Reconstruction and Development Programme*, which instead advocated for expropriation and other non-market mechanisms. See Lahiff (2007) *Third World Quarterly* 1580; Department of Land Affairs, *White Paper on South African Land Policy* Part 4: Land Reform Programmes; Pienaar *Land Reform* 226, 342-343, 819-820.
[24] The policy framework for land reform as set out in the 1997 *White Paper on South African Land Policy* 38 identified three broad categories of reform: (a) land restitution, which provides for relief for victims of dispossession (not limited to forced dispossession); (b) tenure reform, intended to secure and extend tenure

"Redistributive land reform will be largely based on willing buyer willing seller arrangements".[25]

Essentially, Act 126 forms the legal basis for redistribution.[26] In terms of the Act, the Minister may acquire and designate land and develop such land for purposes of small-scale farming, residential, public, community and business or similar purposes [27] and provide funds for land purchase.[28] The details of the redistribution programme are found in various policy documents, which set out either demand-led[29] or supply-led[30] approaches to the acquisition of land. Both approaches are founded on the WBWS principle. With a demand-led approach, the initiative to acquire land lies with potential buyers or more specifically, with the potential beneficiaries of the redistribution programme and not with the State.[31] In other words, the beneficiaries are regarded as the willing buyers in terms of the demand-led approach. In this regard, the role of the State is limited to screening applicants, approving and supplying grants to them, subsidising the land transfer and planning land use.[32] In terms of a supply-led approach to the acquisition of land, the State purchases land upfront from the land owners (willing sellers) and later identifies beneficiaries to whom the land can be transferred in terms of lease or title.[33] In other words, the State is regarded as the willing buyer in terms of the supply-led approach.

Accordingly, a market-based approach to agrarian reform can follow a demand-led (as proposed by the *White Paper*) or supply-led model. The South African government has followed both models, under different leadership over the years.[34] It is noteworthy that the WBWS principle functions within both models.[35]

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rights of the victims of past discriminatory practices; and (c) (forming the focus of this dissertation) land redistribution, a discretionary programme to redress the racial imbalance in landholding.

[25] Department of Land Affairs, *White Paper on South African Land Policy* (1997) Part 4: Land Reform Programmes.

[26] See Chapter 3, 3 2 3 above for more information on the Land Reform: Provision of Land and Assistance Act 126 of 1993.

[27] Section 3 of the Land Reform: Provision of Land and Assistance Act 126 of 1993.

[28] Section 10 of the Land Reform: Provision of Land and Assistance Act 126 of 1993.

[29] See 2 3 below.

[30] See 2 4 below.

[31] MC Lyne & MAG Darroch *Land Redistribution in South Africa: past performances and future policy* (2003) 4-5; Pienaar *Land Reform* 344-345.

[32] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 7.

[33] R Hall *Land Reform* "How and for whom? Land demand, targeting and acquisition" PLAAS 81 <http://www.plaas.org.za/sites/default/files/publications-pdf/AC3.pdf> (accessed 13-08-2019).

[34] Hall "Who, what, where, how, why? Many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 134-139.

[35] Pienaar *Land Reform* 344-345.

Initially, State-assisted, demand-led land purchase took the form of small grants to poor households to buy land for settlement and small-scale farming.[36] However, from 2000 under the leadership of Former President Thabo Mbeki, a new policy, which provided for larger grants in favour of the poor and Black capitalist farmers emerged.[37] From 2011, under Former President Jacob Zuma, the State moved away from State-assisted land acquisition to State-led purchase.[38] Under this supply-driven approach, the State became the purchaser of land (the willing buyer) which did not always result in the transfer of title to the beneficiaries.[39] Instead, such land acquired by the State was usually leased to the beneficiaries.

These market-led approaches are explored to ascertain whether they are suitable for the acquisition of agricultural land for redistribution purposes.

2 2 The WBWS principle

The WBWS principle describes (a) how land can be identified and acquired for redistribution; and (b) how land prices can be determined.[40] Each of these aspects will be discussed briefly.

Generally, the WBWS principle provides that land be acquired by way of a voluntary transaction involving the purchase of land from land owners (willing sellers) willing to sell their land to willing buyers, either to the beneficiaries of the redistribution programme or to the State.[41] However, the land owner will always be regarded as the willing seller, regardless of whether the demand-led or supply-led approach is followed.[42] The WBWS principle

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[36] Hall & Kepe (2017) *Review of African Political Economy* 2. See 2 3 1 below where the Settlement/ Land Acquisition Grant (SLAG) is discussed.
[37] See 2 3 2 below for a discussion of the Land Redistribution for Agricultural Development (LRAD) programme.
[38] Hall & Kepe (2017) *Review of African Political Economy* 2.
[39] See 2 4 below.
[40] Kepe & Hall "Land redistribution in South Africa" Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa (28 September 2016) 16; E du Plessis "Silence is golden: The lack of direction on compensation for Expropriation in the 2011 Green Paper on Land Reform" (2014) 17 *Potchefstroom Electronic Law Journal* 798-831, 804 reiterates that the WBWS approach, is one of the methods to determine market value.
[41] Pienaar *Land Reform* 226; Lahiff (2007) *Third World Quarterly* 1585; L Ntsebesza "Land redistribution in South Africa: The property clause revisited" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 107-121; Pienaar *Land Reform* 226-227; HP Binswanger-Mkhize, C Bourguignon & R van den Brink "Introduction and summary" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink R (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 21-22.
[42] Lyne & Darroach *Land redistribution in South African: Past performance and future policy* 4-5; Pienaar *Land Reform* 226-227, 344; Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21-22.

essentially provides land owners with discretion over their participation in the land reform programme.[43]

In practice, the WBWS principle usually works as follows: The potential buyer searches for and identifies land which he or she wishes to acquire. Much like a private transaction, a written agreement has to be entered into between the seller and the buyer after the land has been identified and the seller is willing to sell the land. The agreement includes an agreed price, which an independent valuer has to confirm as being "market-related".[44] Furthermore, the written agreement has to be accompanied by a farm plan (or business plan). In this regard, the identification of the land and the drafting of the required document alone could take any time period between two months and two years.[45] Accordingly, the procedure restricts the potential buyer from participating in public auctions or concluding a private transaction within the usual timeframe demanded by the market, which excludes them from the majority of land sales.[46] In the meantime, the willing seller who made his or her farm available for acquisition is required to wait for an extended period for confirmation of the sale.[47] During this time, there was no guarantee that the State would agree to the sale.[48] The State could turn down the transaction on technical grounds or on the basis of insufficient funds.[49] Essentially, the process left both the seller and the buyer *in limbo*. The buyer could not begin with the farming process and the seller could not exploit his or her farm in light of the pending sale agreement.[50]

As mentioned above, the price for the land in question has to be market-related,[51] which usually amounts to market value. In this regard, the WBWS principle can also be used as an approach to determine the price for the land on the open market.[52] Accordingly, it has to be determined what a willing seller would be willing to accept for his or her property and what a willing buyer would be willing to pay for the property in question.[53] Apart from more

[43] Lahiff (2007) *Third World Quarterly* 1585; Pienaar *Land Reform* 226-227.
[44] Pienaar *Land Reform* 226, 343; Lahiff (2007) *Third World Quarterly* 1585.
[45] Pienaar *Land Reform* 343; Lahiff (2007) *Third World Quarterly* 1585.
[46] Lahiff (2007) *Third World Quarterly* 1585.
[47] 1585.
[48] Pienaar *Land Reform* 343.
[49] Pienaar *Land Reform* 343; R Hall & E Lahiff "Budgeting for Land Reform" (2004) *Policy Brief 13*, Cape Town: Programme for Land and Agrarian Studies, University of Western Cape 2, where it is stated that insufficient budgets to fund approved projects are a recurring problem since about 2003, which leads to additional (post-approval) delays in transactions. See also Lahiff (2007) *Third World Quarterly* 1585.
[50] Pienaar *Land Reform* 343.
[51] Pienaar *Land Reform* 226, 343; Lahiff (2007) *Third World Quarterly* 1585.
[52] Du Plessis (2014) *PELJ* 803-804. However Du Plessis makes it clear that the willing buyer willing seller approach to the calculation of value for the land is one of many methods to determine market value.
[53] Du Plessis (2014) *PELJ* 803-804.

elaboration on the determination of market value below,[54] it is important to note that this issue does not form the main focus of this Chapter.

2 3 Demand-led approach

With a demand-led approach, the initiative to acquire land lies with potential buyers or more specifically, with the potential beneficiaries of the redistribution programme and not with the State.[55] In this regard, the role of the State is limited to screening applicants, approving and supplying grants to them, subsidising the land transfer and planning land use.[56] This demand-led model was confirmed in the *White Paper* where it is stated that:

> "Government will assist in the purchase of land, but will in general not be the buyer or the owner".[57]

Accordingly, from the outset, South Africa decided on a demand-led market approach based on the WBWS principle.[58] Pienaar points out that the underlying idea was that it would serve as a kind of "sifting process", because only those persons who were really interested in farming and who had the capacity to become productive farmers, would enter into the programme and would be provided with agricultural land.[59] It was also argued that the costs of the programme would be limited, because the beneficiaries would have to select the land themselves.[60] Coupled with the WBWS principle, various grant assisted programmes were established over the years to allow beneficiaries to acquire land. Each grant system is briefly discussed below.

2 3 1 Settlement / Land Acquisition Grant (SLAG)

Until 2000, the redistribution policy centred on the provision of the Settlement/Land Acquisition Grant (SLAG).[61] This grant was proposed in the *White Paper*[62] as a key element

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[54] See 3 2 3 1 and 3 2 3 3 3 below.
[55] Lyne & Darroch *Land Redistribution in South Africa: Past performances and future policy* 4-5; Pienaar *Land Reform* 344-345.
[56] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 7.
[57] Department of Land Affairs, *White Paper on South African Land Policy* Part 4: Land Reform Programmes.
[58] Lyne & Darroch *Land Redistribution in South Africa: past performances and future policy* 4-5; Pienaar *Land Reform* 344-345.
[59] Pienaar *Land Reform* 345. See also FJ Zimmerman "Barriers to participation of the poor in South Africa's land redistribution" (2000) 28 *World Development* 1439-1460, 1439; M Weideman *Land reform, equality and growth in South Africa: a comparative analysis* (2004) 248-249.
[60] Lahiff, Borras Jr & Kay (2007) *Third World Quarterly* 1424.
[61] Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* 45. See also Department of Land Affairs, *White Paper on South African Land Policy* Part 4.7: Grants and Services.
[62] Department of Land Affairs, *White Paper on South African Land Policy* Part 4.7: Grants and Services.

of the redistribution programme.[63] This grant, in line with the *White Paper*, was aimed at the provision of financial assistance to the rural poor[64] and was available to households with an income of less than R1500 per month.[65] The policy provided for a flat grant of R16 000 per household (later raised to R17 500) for the acquisition of land and start-up capital.[66] The land was purchased mainly for settlement and agricultural production.[67] The application for a grant also had to include a business plan.[68] Essentially, SLAG provided fixed grants to self-selected beneficiaries.[69]

This phase (1995-2000)[70] of the redistribution programme in South Africa is generally described as targeting the poorest of the poor, which it appears to have done with some success.[71] However, it was also criticised, amongst other aspects, for locating large groups of poor people on former commercial farms without providing them with the skills or resources to engage and excel in agricultural production.[72] Furthermore, beneficiaries also had to pool their funds in order to be able to purchase unproductive land at high prices.[73]

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[63] Pienaar *Land Reform* 217. See also Lyne & Darroch *Land Redistribution in South Africa: Past performance and future policy* 4-5.

[64] Department of Land Affairs, *White Paper on South African Land Policy* Part 4.7: Grants and Services. Pienaar *Land Reform* 217 where the author cites R Hall & G Williams "Land reform in South Africa: Problems and prospects" (12 December 2000) 7; EN Ranwedzi *The potential limits of the proactive land acquisition strategy: Land reform implementation in Gauteng Province of South Africa* MPhil University of Western Cape (2013) 22; Lahiff (2007) *Third World Quarterly* 1580.

[65] Lahiff (2007) *Third World Quarterly* 1580; Ranwedzi *The potential limits of the proactive land acquisition strategy: Land reform implementation in Gauteng Province of South Africa* 22; Department of Land Affairs, *White Paper on South African Land Policy* 91 and further.

[66] Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* 45; Lahiff (2007) *Third World Quarterly* 1580; Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 134-135. Lower case in the beginning of chapter

[67] Ranwedzi *The potential limits of the proactive land acquisition strategy: Land reform implementation in Gauteng Province of South Africa* 22.

[68] Pienaar *Land Reform* 218. The cost of drafting the business plan could be covered by the Settlement Planning Grant.

[69] Pienaar *Land Reform* 218; R van de Brink, G Thomas and H Binswanger "Agricultural land redistribution in South Africa: towards accelerated implementation" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 152-201, 175.

[70] Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 134-139 where the author discusses the different phases of redistribution programme.

[71] Lahiff (2007) *Third World Quarterly* 1580. M Aliber "What went wrong? A perspective of the first five years of land redistribution in South Africa" 2 <www.oxfam.co.uk/what_we_do/issues/livelihoods/landrights> (accessed 13-08-2019); Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* 45-46 where the author notes that: "Although still inadequate, the pace of delivery accelerated rapidly between 1995 and March 1999. Over this period, roughly 60 000 households were allocated grants for land acquisition, of which 20 000 benefited in the 1998/1999 year alone. Altogether, around 650 000 hectares were approved for redistribution by March 1999, representing less than one percent of the country's commercial farmland."

[72] Lahiff (2007) *Third World Quarterly* 1580. See also in general K Deininger & J May "Can there be growth with equity? An initial assessment of land reform in South Africa" (2000) Policy Research Working paper 2451, Washington DC: World Bank.

[73] P Jacobs, E Lahiff & R Hall "Land redistribution: Evaluating land and agrarian reform in South Africa" (2003) Series No 1. Programme for Land and Agrarian Studies, University of the Western Cape; E Lahiff "State,

A range of weaknesses in implementation and quality of the group projects created in SLAG were identified.[74] This included the size of the grant which was inadequate to purchase suitable land and therefore perpetuated the forming of larger groups for acquiring farming units. The grant was furthermore too minimal to also finance the required production inputs.[75]

2 3 2 Land Redistribution and Agricultural Development (LRAD)

In 2001, the Land Redistribution for Agricultural Development (LRAD)[76] effectively replaced SLAG.[77] The LRAD embodied a move away from a focus on the landless poor towards agricultural production,[78] aimed at creating a new class of black commercial farmers.[79] In this regard, the new policy offered higher grants, which were paid to individuals rather than to households. The policy also made greater use of loan institutions such as the State-owned Land Bank.[80] Whereas SLAG was designed for multiple land use purposes, including both residential and agricultural purposes, LRAD was exclusively for agricultural purposes.

market or the worst of both? Experimenting with market-based land reform in South Africa" (2007) Occasional Paper No 30, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape; Pienaar *Land Reform* 218.

[74] M Wegerif "A critical appraisal of South Africa's market-based land reform policy: The case of the Land Redistribution for Agricultural Development (LRAD) programme in Limpopo" (2004) Research report No. 19 Programme for Land and Agrarian Studies, University of Cape Town.

[75] Jacobs, Lahiff & Hall "Land redistribution: Evaluating land and agrarian reform in South Africa" (2003) Series No 1. Programme for Land and Agrarian Studies; Lahiff "State, market or the worst of both? Experimenting with market-based land reform in South Africa" (2007) Occasional Paper No 30, Programme for Land and Agrarian Studies; Pienaar *Land Reform* 218.

[76] Initially the LRAD was referred to as the Integrated Programme for Land Redistribution and Agricultural Development (IPLRAD). See also See also *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the State failed to convert the tenous land rights of a Black farmer, who was initially offered to purchase the land and become owner thereof in 2003 under the LRAD programme.

[77] Lahiff (2007) *Third World Quarterly* 1580; Ranwedzi *The potential limits of the proactive land acquisition strategy: Land reform implementation in Gauteng Province of South Africa* 24.

[78] Pienaar *Land Reform* 218. See also Lyne & Darroch *Land Redistribution in South Africa: Past performance and future policy* 4-5.

[79] Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 135-138; Kepe & Hall "Land redistribution in South Africa" Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa (28 September 2016) 19.

[80] The Land and Agricultural Development Bank of South Africa is a government owned juristic person, established in terms of the Land and Agricultural Development Bank Act 18 of 1912; 13 of 1994 and 15 of 2002. It is the leading agricultural financier in South Africa since its inception in 1912. It offers financial services to establish emerging farmers and to provide financial assistance to farmers in general. See also section 3 which sets out the objectives of the Act.

The LRAD programme was expected to enhance "commercial" agricultural production for the market rather than subsistence production.[81] LRAD differed from SLAG in that beneficiaries did not have to be poor to qualify for a grant.[82]

Moreover, the income ceiling as set out in SLAG, which determined whether a person qualified for a grant, was removed. This meant that the grant was not restricted to the poorest of the poor, but was rather accessible to a variety of beneficiaries, including the poorest of the poor.[83] In terms of this policy, beneficiaries could access LRAD grants from R20 000 to R100 000,[84] depending on the contribution he or she made in cash, labour and / or kind.[85] In this regard, the size of the contribution determined the value of the grant for which the person could qualify.[86] This meant that those who were better-off would get more support.[87] The increased size of the grant and the allocation to individuals meant that in practice, multiple adult members of the same household could apply for LRAD grants with the intention of pooling the grants together to buy bigger parcels of land.[88]

However, in 2005 at the National Land Summit, opposition was voiced against the market-based WBWS redistribution policy in general and against the LRAD in particular.[89] The land purchase grants in terms of LRAD were deemed to be insufficient.[90] Furthermore, delegates complained that land owners were able to inflate prices and in some instances elected not to sell the land to land reform beneficiaries.[91] It was argued that a threat of expropriation and the payment of below-market compensation were required to ensure that the land owners

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[81] M Andrew, A Ainslie & C Shackleton "Land use and livelihoods: Evaluating Land and Agrarian Reform in South Africa" (2003) *Series No 8. Programme for Land and Agrarian Studies, University of the Western Cape*.
[82] Ranwedzi *The potential limits of the proactive land acquisition strategy: Land reform implementation in Gauteng Province of South Africa* 24.
[83] Pienaar *Land Reform* 218.
[84] R Hall "Transforming rural South Africa? Taking stock of land reform" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 87-106, 90-91.
[85] Department of Rural Development and Land Reform, *Integrated Program of Land Reform and Agricultural Development in South Africa* 'Land Redistribution for Agricultural Development: A sub-programme of the Land Redistribution Programme' <http://land.pwv.gov.za/redistribution/lrad.htm> (accessed 26-06-2018).
[86] Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 136.
[87] Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 136.
[88] Dlamini *Taking land reform seriously: From willing seller-willing buyer to expropriation* 4, 6-49.
[89] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 22.
[90] 22.
[91] 22.

would agree to reasonable offers made by the beneficiaries for the acquisition of the land.[92] Accordingly, a new direction for land redistribution was proposed.

Essentially, the new strategy required the State to play a more proactive role in the redistribution programme, which included the timeous identification and acquisition of land by the State. This strategy ran alongside the continued implementation of LRAD and related grant-based purchases until 2011, whereafter it was discontinued and replaced by the State-purchase-and-leasing model.[93]

2 4 Supply-led approach

In terms of a supply-led approach to the acquisition of land, the State purchases land upfront from the land owners (willing sellers) and later identifies beneficiaries to whom the land can be transferred in terms of lease or title.[94]

In 2006, government introduced a new redistribution policy (in line with the proposals made at the National Land Summit in 2005), called the Proactive Land Acquisition Strategy, which is a supply-driven model that operates within the WBWS principle. The policy shift from a demand-driven to a supply-driven model has brought changes in terms of planning, implementation and resource mobilization.[95] For example, in terms of resource allocation and mobilization the State as the willing buyer (as opposed to the beneficiaries under SLAG and LRAD) could spend more or as much as was needed to buy land needed for redistribution instead of disbursing grants to beneficiaries.

2 4 1 Proactive Land Acquisition Strategy (PLAS)

The Proactive Land Acquisition Strategy (PLAS) commenced in 2006 and from 2011 it replaced LRAD and all other grant-based programmes.[96] PLAS gives far-reaching discretionary powers to officials, rather than disburse grants to enable beneficiaries to buy land for themselves. Officials may determine (a) which land should be acquired by the State,

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[92] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 22.
[93] 15, 24.
[94] Hall *Land Reform* "How and for whom? Land demand, targeting and acquisition" PLAAS 81 <http://www.plaas.org.za/sites/default/files/publications-pdf/AC3.pdf> (accessed 13-08-2019)
[95] Ranwedzi *The potential limits of the proactive land acquisition strategy: Land reform implementation in Gauteng Province of South Africa* iii.
[96] Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided, Land Restored* 138-139; Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 7.

(b) whether it should be transferred in title or leased; and (c) if so, to whom and on what terms.[97]

Despite the State's objective to increase Black land ownership,[98] the strategy entailed the State buying farms and leasing the land to beneficiaries for a period of three years. Therefore, land was not necessarily registered in the names of Black owners.[99] Land would only be transferred pending the successful use of the land during the three year trial period.[100]

The land, which could be acquired for redistribution, was still those farms that were offered for sale in light of the WBWS principle. However, because the State was now the willing buyer (as opposed to the beneficiaries under SLAG and LRAD), it could spend as much as was needed (and available in the national budget) to buy farms that were needed for redistribution.[101] In other words, the State can purchase land directly, instead of disbursing grants to enable beneficiaries to buy land.

Accordingly, the strategy focuses on the State buying and then leasing out whole commercial farms at discounted rates. While this model addressed the problem of buying land with small land-purchase grants under SLAG and LRAD, "it does not advance visions of agrarian reform".[102] The reason for this is that it does not allow for transfer of land ownership to beneficiaries, and in the absence of long-term leases, leaves beneficiaries' land tenure rights insecure.[103] Without clear and secure land tenure rights, land redistribution beneficiaries struggle to get agricultural production support from State departments.[104] Accordingly, beneficiaries are not equipped with the necessary support to farm. This

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[97] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 24.
[98] Pienaar *Land Reform* 219.
[99] 219.
[100] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 24.
[101] Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided Land Restored* 138-139.
[102] 138-139.
[103] However see also *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the State failed to convert the tenuous land rights of a Black farmer, who was initially offered to purchase the land and become owner thereof in 2003 under the LRAD programme.
[104] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 24-25.

approach furthermore does not address skewed land ownership patterns as the land remains registered in the name of the State.

2 4 2 State Land Lease and Disposal Policy (SLLDP)

The model adopted through PLAS was confirmed in July 2013, after the centenary of the 1913 Black Land Act, when Minister Nkwinti adopted a SLLDP.[105] In terms of this policy, beneficiaries of land redistribution are not to acquire ownership (title) of the land. Instead, beneficiaries will be able to lease the land from the State.[106]

The SLLDP applies to farms (agricultural land) acquired through PLAS.[107] The Policy confirmed that land redistribution will not involve the transfer of land from White to Black ownership.[108] In this regard, the Policy makes provision for four categories of beneficiaries, each with different land rights:[109]

> "(1) households with no or very limited access to land (2) small-scale farmers farming for subsistence and selling part of their produce on local markets (3) medium-scale commercial farmers already farming commercially on a small-scale and with aptitude to expand, but constrained by land and other resources and (4) large-scale commercial farmers whose operations are disadvantaged by location, size of land and other circumstances and with the potential to grow".[110]

[105] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 26.
[106] R Hall "What's wrong with government's state land lease and disposal policy, and how can it be remedied?" *PLAAS Position Paper for National Land Tenure Summit, 2014: State Land Lease and Disposal Policy* (2014) <http://www.plaas.org.za/blog/whats-wrong-governments-state-land-lease-disposal-policy-and-how-can-it-be-remedied.> (accessed 13-08-2019).
[107] B Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in B Cousins & C Walker (eds) *Land Divided Land Restored* (2015) 253.
[108] R Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in *Land Divided Land Restored* 140-141.
[109] Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253.
[110] Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013) 13; Pienaar *Land Reform* 256-257.

Beneficiaries falling in categories 1 and 2 will lease State land[111] at a nominal rental of one rand per annum, without the option to purchase the land.[112] In this regard, the Policy assumes that there will only be one lessee per farm and it does not provide for the subdivision of large farms to provide for smallholders. The Policy also denies poor Black South Africans from owning the land, because it only provides for lessees of the State.[113]

Categories 3 and 4 will be allowed to lease State land for a period of 30 years, with the option to renew the lease for another 20 years, and with the option to purchase.[114]

Accordingly, the SLLDP aims to provide land or to make land available, in the form of a lease, to different categories of beneficiaries (specifically famers). The category of farmer will also determine whether the option to purchase the land is available.[115] The underlying goal is therefore to broaden access to land, while not necessarily changing the ownership patterns of agricultural land. As explained, the agricultural land would remain vested in the State.[116]

2 5 New proposed policies

Since 2013, several new policies have been proposed by the former DRDLR. However, these policies have not been finalised or officially confirmed and adopted.[117] These policies are briefly discussed below.

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[111] Pienaar *Land Reform* 254-259. The policy applies to all immovable State assets and includes the following categories: (a) former South African Development Trust land, including land in the former self-governing territories and national states that has not yet been assigned to authorities; (b) land that has been acquired under the Land Reform: Provision of Land and Assistance Act 126 of 1993; (c) other immovable assets that had been transferred from other government departments for land reform purposes; (d) immovable assets acquired under the Restitution of Land Rights Act 22 of 1994; (e) immovable assets held in trust for traditional communities; and (f) some assets that had been acquired by the State as part of asset forfeiture involving the Asset Forfeiture Unit.

[112] Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013).

[113] Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253.

[114] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013) 25; Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253.

[115] Pienaar *Land Reform* 256.

[116] 256.

[117] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 27 point out that "[i]t is beyond the scope of this report to engage in detailed analysis of these policies – especially as we cannot obtain final written versions of the policies or any implementation manuals, nor have any details of their implementation been made public thus far, nor evaluations conducted as far as we are aware. Nonetheless, we offer some brief comments by way of assessing the broad approach adopted in each case".

2 5 1 The 50/50 policy

In 2014, final draft policy proposals on *Strengthening the Relative Rights of People Who Work the Land* (commonly referred to as the "50/50 policy") were published.[118] In essence, the 50/50 policy proposes a share equity scheme on privately owned commercial farms.[119] The Policy is based on the relative contribution of farm workers or farm dwellers to the development of the farm.[120] Accordingly to the Policy:

> "…the historical owner of the land automatically retains 50% of the land, while the labourers of the land assume ownership of the remaining 50%, proportional to their contribution to the development of the land, based on the number of years they had worked on the land".[121]

The State will buy 50% of the farm from the owner to be shared by the labourers, based on the value provided by the Valuer-General.[122] However, the money will be channelled through the National Empowerment Fund[123] ("NEF") and invested into the New Company, which must be established and representative of all equity-holders of the farm.[124] In this way the owner of the farm enterprise becomes a 50% shareholder. The beneficiaries also obtain 50% shareholding in the New Company, in accordance with the length of their service on the farm. In other words, the workers will acquire equity shares in the *farm enterprise* depending on their length of "disciplined service".[125] In this regard, workers who have been

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[118] JM Pienaar "Land Reform: April to June" (2014) 2 *Juta Quarterly Review* 1-7; Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 9-10*;* Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014) 6, 8-11.

[119] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 8*;* Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014) 8-11.

[120] Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014) 8.

[121] Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014) 8; Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 9. See in general Pienaar (2014) *JQR* 1-7.

[122] Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014) 9; Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 9.

[123] The NEF is the central government agency responsible for catalysing Broad-Based Black Economic Empowerment by supporting and funding black entrepreneurs and black-owned businesses.

[124] Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014); Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 9-10.

[125] Apart from being linked to the length of service on the farm, it is unclear what "disciplined service" means in this context. Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014) 9-10; Department of Rural Development and Land Reform,

employed for 10 years may receive 10% share-equity on the land. Workers with 25 years of disciplined service should be entitled to 25% share-equity on the land and workers with 50 years of disciplined service should be entitled to 50% share-equity on the land.[126] The acquisition of equity introduces co-management of the farm, based on the relative equity-holdings. The farm owners and workers will also benefit from dividends allocated by the New Company.[127]

The Policy suggests that it deepens security of tenure for farm workers and farm dwellers.[128] However, while the share equity scheme may bring about co-management and co-ownership of the *farm enterprise*, it is unclear and doubtful whether the scheme effects transfer of the agricultural land from the land owner to the beneficiary. It is argued that the farm workers and dwellers are regarded as shareholders in the particular farm enterprise and do not become owners of the agricultural land. Instead, as shareholders, the farm workers and dwellers will receive an additional income by way of receiving payment in the form of dividends. In this regard, it is questionable whether the Policy strengthens security of tenure for farm workers, as their rights in relation to the land are unclear. In terms of the Policy it is unclear whether the land is registered in the name of the original owner or the New Company. If the land remains registered in the name of the original owner, then these schemes do not address skewed land ownership patterns. If the land is registered in the name of the New Company, it is unclear how this transfer of ownership will be reflected in the 30% target to transfer land in white ownership to Black beneficiaries. In other words, if registered in the name of the New Company, the agricultural land remains in white ownership, although in the form of co-ownership.

The 50/50 policy envisages a voluntary programme that is demand-driven in that land owners (as opposed to the beneficiaries or the State) initiate the process by expressing interest to participate in the programme.[129] The land owner must submit a proposal to the

Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework (March 2017) 9-10.

[126] Department of Rural Development and Land Reform *Strengthening the Relative Rights of People Who Work the Land* (21 February 2014) 9-10; Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 9-10.

[127] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 10.

[128] Pienaar (2014) *JQR* 1; Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 8.

[129] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 15.

relevant office of the DALRRD (formerly the DRDLR).[130] The State is thus involved in the process of selecting eligible and suitable farms for the 50/50 programme. The selection of the farms to participate in the programme will be based on the evaluation of several criteria,[131] including: Firstly, the farm must be a "viable and profitable business that generates benefits for farm owners and farm workers".[132] In this regard there must be evidence of a profitable agricultural enterprise. Secondly, the project must have a realistic business plan to ensure that the land productivity will be sustained.[133] Thirdly, beneficiaries of the share equity scheme must be South African citizens and farm workers or farm dwellers that have occupied the land for an extended period of time[134] and they must "demonstrate ownership and buy-in to the proposal".[135] According to the *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework*, this means that:

> "In order to qualify, farmworkers must be South African citizens who have occupied that land for an extended period of time and must have fulfilled agreed-upon land-related roles and responsibilities. Farmworker beneficiaries have to be screened, categorized and selected in accordance with their level of competence and potential to be appointed in specific positions as workers, supervisors or even managers."[136]

Fourthly, there must also be a partnership between the farm workers and the farm owner(s).[137] In this regard, the relationship between the farm workers and the farm owner must be conducive for equity sharing and co-management. Fifthly, in order for the farm to qualify for the 50/50 programme, the farm must not be subject to a restitution claim under

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[130] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 15.
[131] 11.
[132] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 11.
[133] 12.
[134] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 12 which provides that: "The policy stated that it targets farm workers that have worked in a farm for an extended period of time; however, the extended period of time is not defined. The first draft of the policy had indicated that workers who have been employed at the farm for a period of 10 years and more would benefit".
[135] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 12.
[136] 12.
[137] 13.

the Restitution of Land Rights Act 22 of 1994.[138] If the farm qualifies for the 50/50 programme the land will be valued by the Office of the Valuer-General.[139]

Finally, there must be proven skills transfer opportunities in the form of "training, mentoring, skills development and coaching of farm workers, which should be aligned to their current competency and capacity for potential training."[140]

Although the Department has commenced with the implementation of the equity sharing arrangements on various farms, it has not adopted any final Policy to this effect.[141]

2 5 2 One Household One Hectare Policy

Despite the lack of a formalised and adopted policy, such as the 50/50 Policy, another policy which was launched in October 2015, is the *One Household One Hectare Policy*. The objectives of the Policy are broadly:

> "a) To contribute to the reduction of poverty in rural areas; b) Revive a caliber of highly productive black smallholder farmers and food producers; c) Build security of tenure, access to land, increase the involvement of individual households in production activities and minimize controversies on CPI lead landed projects; d) Create sustainable employment in rural households; e) Create viable rural small to medium agricultural enterprises; f) To build competencies and broaden the skills base for targeted households and communities; g) The restoration of the social capital and beauty of ubuntu as the currency that creates social cohesion among rural households; and h) Rebuilding the sanctity and dignity of family life as the most critical success factor in the rural socio-economic transformation effort of the state".[142]

In essence the Policy "aims to provide small allotments for vegetable gardening for non-commercial purposes on *state* land".[143] Accordingly, the Policy is aimed at beneficiaries in

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[138] Pienaar (2014) *JQR* 1. Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 13-14.
[139] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 15. See also the Property Valuation Act 17 of 2014.
[140] Department of Rural Development and Land Reform, *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017) 13.
[141] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 27-28.
[142] Y Mfaise "Addressing land redistribution through the One Household One Hectare Policy" (17 July 2017) <https://www.politicsweb.co.za/news-and-analysis/addressing-land-redistribution-through-the-one-hou> (accessed 11-07-2019).
[143] My emphasis. Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 27.

need of agricultural land for purposes of subsistence farming. Importantly, under this Policy, there is no need for the government to acquire the land by way of market-led approaches as the land is already owned by it and ready to be redistributed. As there is no formal policy to analyse, there is a lack of information regarding the qualifying and selection criteria and process and the types of rights beneficiaries may acquire under this policy.

2 6 A move away from market-led approaches

Despite an active land market in South Africa,[144] the key constraint of the market-led approach to redistribution is that beneficiaries are faced with substantial difficulties in acquiring suitable land on the open market.[145] Three reasons can be identified for this phenomenon.

Firstly, the land that was offered up by the land owner (the willing seller) was not always suitable for the needs and demands of the beneficiaries in relation to both the quality and scale of the land.[146] Good quality land in particular, is usually sold either by way of public auctions or private contracts, which typically ensure that ownership of the land is transferred within a few months of the initial offer to sell.[147] In this regard, the funding applications from potential land reform beneficiaries generally take longer than this process,[148] which means that much of the land being transacted is not available to land reform beneficiaries.[149] Furthermore, the size of the farms available for acquisition tends to be larger than what would be suitable for the beneficiaries as new entrants to the agricultural sector.[150] Lahiff explains further that this problem is exacerbated by the official bias against subdivision as embodied in SALA.[151] Even if all legal obstacles are removed, it is still unlikely that land owners will subdivide their properties,[152] because subdivision is seen as an "expensive and administratively cumbersome process".[153] Accordingly, the size of the land available on the market continues to be relatively large holdings. This inevitably means that reform

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[144] Pienaar *Land Reform* 226; Hall "Transforming rural South Africa? Taking stock of land reform" in *The Land Question in South Africa* 98
[145] Pienaar *Land Reform* 226-227. See also Hall "Transforming rural South Africa? Taking stock of land reform" in *The Land Question in South Africa* 98; Lahiff (2007) *Third World Quarterly* 1585.
[146] Pienaar *Land Reform* 226-227. See also Hall "Transforming rural South Africa? Taking stock of land reform" *The Land Question in South Africa*, 98; Lahiff (2007) *Third World Quarterly* 1585; Du Plessis (2014) *PELJ* 801.
[147] Lahiff (2007) *Third World Quarterly* 1585.
[148] 1585.
[149] Lahiff (2007) *Third World Quarterly* 1585.
[150] 1585.
[151] Lahiff (2007) *Third World Quarterly* 1585. See Chapter 3, 3 2 4 above.
[152] Aliber & Mokoena "The interaction between the land redistribution programme and the land market in South Africa: A perspective on the willing-buyer/willing seller approach" (2002) *Land reform and agrarian change in Southern Africa: An occasional paper series* 1-45 in general.
[153] Lahiff (2007) *Third World Quarterly* 1588.

beneficiaries have no choice but to group their individual grants together to purchase (larger) pieces of land. If the land is acquired, there is no assistance provided to the beneficiaries wanting to subdivide the land in question.[154] Arguably, the failure to subdivide land can be regarded as a contributor to the failure and general underperformance of the redistribution programme in South Africa.[155]

Secondly, the prices of the land seemed to be inflated.[156] Market-related prices or market value is usually paid for the land in question.[157] Given the voluntary nature of the market-led approach to land reform in general,[158] only farmers who are very committed to land reform would enter into a land reform transaction. This also means that the farmers, who do enter into negotiations for selling land for land reform purposes, have a relatively strong negotiation position as there are not many farms in the market for this purpose.[159] If the valuers estimate a price that is below the perceived market value, they can only make such an offer to the farmer who is then free to reject such an estimate. Arguably, the bargaining power of the land owner allows such an owner to ask for prices well above market value. Accordingly, much of the blame for the inflated land prices, which consequently make the acquisition of land unaffordable and potentially unsustainable, was attributed to the lack of willingness to sell by white land owners in cases where the government was involved in purchasing.[160]

Lastly, bureaucratic delays[161] in (a) the administration of grants; or (b) in relation to the negotiations between the State (on behalf of the beneficiaries) and the land owners frustrated the parties involved in the land transactions.[162] With regard to the former, Cousins explains that a key constraint to the effective implementation of market-led approaches is limited State capacity. He holds that there are various dimensions to limited State capacity that may result in the slow pace of redistribution, including "effective political leadership and vision, appropriate skills and experience, efficient systems and procedures and sufficiently

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[154] 1588.
[155] Lahiff (2007) *Third World Quarterly* 1588.
[156] Pienaar *Land Reform* 226-227. See also Hall "Transforming rural South Africa? Taking stock of land reform" in *The Land Question in South Africa* 98; Lahiff (2007) *Third World Quarterly* 1585; Du Plessis (2014) *PELJ* 801.
[157] Pienaar 226, 343; Lahiff (2007) *Third World Quarterly* 1585.
[158] Lahiff (2007) *Third World Quarterly*, 1585; Pienaar *Land Reform* 226-227.
[159] Du Plessis (2014) *PELJ* 804.
[160] Department of Land Affairs, *Annual Report* (2005).
[161] Du Plessis (2014) *PELJ* 804.
[162] Pienaar *Land Reform* 226-227. See also Hall "Transforming rural South Africa? Taking stock of land reform" *The Land Question in South Africa* 98; Department of Land Affairs, *Annual Report* (2005) 1585.

large budgets".[163] With regard to the latter, the beneficiaries, especially in supply-led market approaches, are not directly involved in the negotiation process and must rely on the officials of the Department of Rural Development and Land Reform to do the negotiation on their behalf.[164] Du Plessis explains that "even if there are small differences in price that a willing buyer [beneficiary] would have negotiated around, the deal might fall through because the officials do not negotiate as a willing buyer would".[165]

The WBWS principle as a method of acquiring land, coupled with all of the above considerations, is thus often regarded as the reason for the slow pace of land reform in South Africa.[166] In this light, this particular approach to acquire land for redistribution has failed.[167] However, Pienaar notes further that the problematic aspect was perhaps not the WBWS principle itself, but rather the way in which it was moulded and applied in South Africa specifically.[168] Although the WBWS principle is regarded as an obstacle to effectively implement land redistribution[169] it is important to note that this principle is not contained in section 25 of the Constitution.[170]

Increasingly, the shortcomings resulted in calls for the abolishment of the market-based approach at the 2005 National Land Summit and again at subsequent ANC conferences in 2007[171] and 2012.[172] However, the concerns raised did not immediately result in any official

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[163] Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 268.
[164] Du Plessis (2014) *PELJ* 804.
[165] Du Plessis (2014) *PELJ* 804; Lahiff (2007) *Third World Quarterly* 1586.
[166] M Aliber "Unravelling the willing buyer, willing seller question" in B Cousins & C Walker (eds) *Land Divided Land Restored* (2015) 145-160; Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 31-32.
[167] Du Plessis (2014) *PELJ* 804; Pienaar *Land Reform* 249; Aliber "Unravelling the willing buyer, willing seller question" in *Land Divided Land Restored* 145-160.
[168] Pienaar *Land Reform* 360-361.
[169] 34.
[170] Report of the High Level Panel on the Assessment of key legislation and the acceleration of fundamental change (November 2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf> (accessed 06-06-2018) 206 onwards.
[171] The 52nd National Conference of the African National Congress (ANC) was held in Polokwane, Limpopo from 16–20 December 2007. It elected former President Jacob Zuma and supporters to the party's top leadership and National Executive Committee (NEC), representing a significant defeat for Thabo Mbeki, then the party's incumbent president and president of the country. The conference was also significant as a precursor to the general election of 2009, in which the newly elected leader (Jacob Zuma) of the ANC, became the next President of South Africa.
[172] The 53rd National Conference of the African National Congress (ANC) was held in Decemeber 2012. It is also regarded as a precursor to the general election of 2014. See also Pienaar *Land Reform* 249, 360. See also W du Plessis, JM Pienaar & NJJ Olivier "Land matters and rural development: 2009 (2)" (2009) 2 *SA Public Law* 608-610 and R Hall & L Ntsebeza "Introduction" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 1-26, 15-16.

policy or legislative amendments.[173] In light of the shortcomings, the Policy Framework for Land Acquisition and Land Valuation published in 2012[174] proposed that the South African government should abolish the WBWS principle, while making more use of expropriation as a means of acquiring land.[175] Expropriation as an alternative to market-led approaches for the acquisition of land is accordingly explored.

3 Expropriation

3 1 Introduction

Despite the fact that there are various pieces of legislation that provide for expropriation for land reform purposes,[176] and that it is aptly suited for the acquisition of agricultural land,[177] the State has underutilised their expropriation powers in redistribution cases.[178] To date, expropriation has only been used as a mechanism of last resort in cases where unreasonable objections or delays have prevented the acquisition of land for redistributive purposes by way of market-led approaches.[179] The State may be poised to utilise its expropriation powers more in future in light of recent developments,[180] which may result in an amended property clause that authorises expropriation without compensation.[181]

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[173] Pienaar *Land Reform* 249. In this regard, the establishment of the Office of the Valuer-General set out in the Department of Rural Development and Land Reform, *Green Paper on Land Reform* 2011 was the first step in addressing these concerns.

[174] Department of Rural Development and Land Reform, *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment of the Office of the Valuer-General* (18 October 2012).

[175] Department of Rural Development and Land Reform, *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment of the Office of the Valuer-General* (18 October 2012) 4; Pienaar *Land Reform* 250. See 3 2 3 2 and 3 2 3 5 below where the Property Valuation Act 17 of 2014 and the role of the Valuer-General are discussed.

[176] The following provisions specifically allow for the expropriation of property for land reform purposes: Sections 10, 10A and 12 of the Land Reform: Provision of Land and Assistance Act 126 of 1993 and section 26 of the Extension of Security Tenure Act 62 of 1997. Further measures are also contained in Part 4, section 9 of the Housing Act 107 of 1997; section 2 read with the definition of "acquire" in the definition list of the Eastern Cape Disposal Act 7 of 2000; sections 22, 35, 42A, 42C and specifically section 42E of the Restitution of Land Rights Act 22 of 1994 and section 3 of the Land Reform (Labour Tenants) Act 3 of 1996. See also clause 26 of the Regulation of Agricultural Land Holdings Bill 37. See also Pienaar *Land Reform* 365-368; AJ van der Walt *Constitutional Property Law* 3 ed (2011) 395, 462.

[177] Pienaar *Land Reform* 365-368; Van der Walt *Constitutional Property Law* 395, 462.

[178] L Ntsebeza "Land redistribution in South Africa: The property clause revisited" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 107-121; Pienaar *Land Reform* 121.

[179] H Mostert & A Pope (eds) *The Principles of the Law of Property* (2010) 188; Du Plessis (2014) *PELJ* 802.

[180] See 3 3 below.

[181] See also the Draft Expropriation Bill B-2019 at 3 2 3 4 below. See also recent developments regarding the possible amendment of the Constitution to allow for expropriation without compensation, specifcally see B Hoops "Expropriation without compensation: A yawning gap in the justification for expropriation?" (2019) 136 *South African Law Journal* 261-302; T Ngukaitobi & M Bishop "The Constitutionality of Expropriation without Compensation" <https://www.wits.ac.za> (accessed 02-08-2019); Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 30-07-2019) 66-75.

Accordingly, expropriation (with our without compensation) is explored as a suitable approach for the acquisition of agricultural land for redistribution purposes.

3 2 Definition and elements of an expropriation

Expropriation is an original mode of acquisition of property[182] and can be described as:

> "A unilateral act by the state which, based on the operation of law and sanctioned by the Constitution, acquires private property, where the loss of property by the former owner is usually total and permanent. The property is ordinarily acquired by or on behalf of the state for a public purpose or in the public interest and compensation is payable".[183]

In South Africa, expropriations are governed by sections 25(1), 25(2) and 25(3) of the Constitution.[184] In terms of the *FNB*-methodology discussed in Chapter 4, a deprivation is a subset of an expropriation,[185] which means that expropriation must also comply with section 25(1) of the Constitution. The requirements for a non-arbitrary deprivation of property were

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[182] This was accepted in *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 2 SA 584 (CC) para 58, referring to Van der Walt *Constitutional Property Law* 344. Similarly Gildenhuys *Onteieningsreg* 8 defines expropriation as a unilateral extinction of property or rights in property by the State and the acquisition of property or rights in property by the State. See further EJ Marais & PJH Maree "At the intersection between expropriation law and administrative law: Two critical views on the Constitutional Court's Arun judgment" (2016) 19 *Potchefstroom Electronic Law Journal* 2-54. In other words, expropriation is an original mode of acquisition. See AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016) 354; Mostert & Pope (eds) *The Principles of The Law of Property* 188; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 173-174.

[183] E du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans & LCA Verstappen (eds) *Rethinking Expropriation Law III: Fair Compensation* (2018) 189-220, 189. Although somewhat contentious, the State acquisition requirement was confirmed by the Constitutional Court in *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 48. See also E Marais "When does state interference with property (now) amount to expropriation? An analysis of the Agri SA court's state acquisition requirement (part 1)" (2015) 18 *Potchefstroom Electronic Law Journal* 2983-3031 and E Marais "When does state interference with property (now) amount to expropriation? An analysis of the Agri SA court's state acquisition requirement (part 2)" (2015) 18 *Potchefstroom Electronic Law Journal* 3033-2069; A Gildenhuys *Onteieningsreg* 2 ed (2001) 26-27. Furthermore, the definition of "expropriation" in the previous Expropiation Bill, namely clause 1 of the Expropriation Bill B4-2015 in *GG* 34818 of 26-01-2015, is in line with the finding in *AgriSA*, because it is defined as the "compulsory acquisition of property". See also *Harken v Lane NO* 1998 1 SA 300 (CC) para 12; I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 530-562, 548; B Hoops *The Legitimate Justification of Expropriation: A Comparative Law and Governance Analysis* (2017) 376. See also MD Southwood *The Compulsory Acquisition of Rights* (2000) 14 where the author describes expropriation as "the process by which an owner is deprived of all or some of his rights in his property, which rights become vested in the state or some other public persona authorised to acquire those rights". See further AJ van der Walt & H Botha "Coming to grips with the new constitutional order: critical comments on Harksen v Lane NO" (1998) 13 *South African Public Law* 17-41 for critique on the *Harksen v Lane NO* 1998 1 SA 300 (CC) judgment.

[184] Hoops *The Legitimate Justification of Expropriation* 375; H Mostert "The poverty of precedent on public purpose/interest" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans & LCA Verstappen (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 59-92, 59. See also Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 190-193.

[185] Van der Walt *Constitutional Property Law* 204; E van der Schyff *Property in Minerals and Petroleum* (2016) 288. See Chapter 4, 2 3 for a brief exposition of the difference between a "deprivation" and an "expropriation".

discussed in Chapter 4 and need not be repeated here.[186] Sections 25(2) and 25(3) of the Constitution set out the elements for a valid expropriation.[187] In this regard, section 25(2) does not protect private property *per se*. Instead, it simply provides for the circumstances under which the State can lawfully expropriate property,[188] as follows:

> "Property may be expropriated only in terms of law of general application — (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."[189]

Accordingly, in cases where the land owner refuses to sell his or her property to the State voluntarily, the State does not need to continue negotiating with the owner. In such cases, the State can summarily expropriate property, provided that the requirements in the authorising legislation and the Constitution are adhered to.

Section 25(3) pertains to the calculation of compensation for the expropriation, namely:

> "The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including — (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation."[190]

It is somewhat contentious whether the payment of just and equitable compensation is a pre-requisite for a valid expropriation or whether it is merely the consequence of a valid

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[186] See Chapter 4, 2 4 above.

[187] Sections 25(2), (3) and (4) of the Constitution of the Republic of South Africa, 1996. Apart from the requirements for an expropriation set out in section 25(2) of the Constitution, an expropriation must also meet the requirements of a deprivation in section 25(1) of the Constitution, because all expropriations are treated as a subset of deprivations. In other words, if a deprivation of property passes scrutiny under section 25(1) of the Constitution, then the question arises whether the deprivation amounts to an expropriation. If the deprivation amounts to an expropriation, then it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b). See *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 57-59. See Chapter 5, 3 2 in this regard.

[188] Mostert "The poverty of precedent on public purpose/interest" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 59; BV Slade *The Justification of Expropriation for Economic Development* LLD, Stellenbosch University (2012) 48 (relying on *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) para 82); and Van der Walt *Constitutional Property Law* 459.

[189] Section 25(2) of the Constitution of the Republic of South Africa, 1996.

[190] Section 25(3) of the Constitution of the Republic of South Africa, 1996; Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 192-198.

expropriation.[191] If payment of compensation is not a pre-requisite for a valid expropriation,[192] the validity of the expropriation cannot be challenged by the land owner on the basis that the compensation is not sufficient. The validity of the expropriation can then only be challenged if it is not authorised in legislation, adopted in a procedurally unfair manner or not undertaken for public purpose or a public interest.[193] However, this issue will not be investigated further for purposes of this dissertation.[194]

Accordingly, the elements of an expropriation under South African law will be discussed. The expropriation (a) must be undertaken in terms of a law of general application; (b) must serve a public purpose or public interest; and (c) is subject to the payment of compensation.[195] Each of these elements will be discussed in turn.

3 2 1 The law of general application

Expropriation is a State action which is always carried out in terms of statutory authorisation.[196] While there may be different methods of expropriation,[197] the process

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[191] JM Pienaar "Onteiening sonder vergoeding: voorvereiste vir suksesvolle grondhervorming of populisme?" *LitNet* (18 January 2018) <http://www.lintnet.co.za/onteiening-sonder-vereiste-vir-suksesvolle-grondhervorming-populisme> (accessed 30-05-2018) 4; Mostert "The poverty of precedent on public purpose/interest" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 59. See also Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 192-193.

[192] However see, *Haffejee and NO v eThekwini Municipality* 2011 6 SA 134 (CC) para 14 where the Court held that: "The obligation to pay compensation is a condition of expropriation, but not a prerequisite for its operation."

[193] Mostert "The poverty of precedent on public purpose/interest" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 59.

[194] See BV Slade "The 'law of general application' requirement in expropriation law and the impact of the Expropriation Bill of 2015" (2017) 50 *De Jure* 346-362; BV Slade, JM Pienaar, ZT Boggenpoel & T Kotzé "Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018) <https://www.sun.ac.za/english/PublishingImages/Lists/dualnews/My%20Items%20View/Submission%20to%20Constitutional%20Review%20Committee%20_%20Slade%20Pienaar%20Boggenpoel%20Kotze%20003.pdf> (accessed 15-08-2019).

[195] Section 25(2) of the Constitution of the Republic of South Africa, 1996. See also Van der Walt *Constitutional Property Law* 335, 452-485. Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 189 also highlights that the expropriation must be effected in a way that is procedurally fair in terms of section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.

[196] Van der Walt *Constitutional Property Law* 453. See also T Roux "Property" in MH Cheadle, DM Davis & NRL Haysom (eds) *South African constitutional law: The Bill of Rights* (2002) 429-472; Gildenhuys *Onteieningsreg* 9-11, 93 where the author explains that the right to expropriate cannot take place in terms of the common law. See also Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 190. Furthermore, see in general Slade (2017) *De Jure* 346-362; Slade *The Justification of Expropriation for Economic Development* in general. See Chapter 4, 2 7 1.

[197] Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 191-192; Gildenhuys *Onteieningsreg* 13-15 where the author explains that there are different methods of expropriation: (a) the judicial method of expropriation and (b) the administrative method of expropriation. In terms of the former, the expropriator acquires the property or right in property by way of a judgment. Examples of the judicial method

usually takes the form of a discretionary administrative action[198] in accordance with a particular authorising statute.[199] The most important measure, while not the only piece of legislation,[200] that provides for the authority to expropriate or expropriating powers for land reform purposes, is the Expropriation Act 63 of 1975 ("Expropriation Act").[201] The Expropriation Act provides that the expropriating administrator is usually the Minister of Public Works,[202] although other laws may also authorise other bodies to expropriate property.[203] For example, the Regulation Bill provides that the Minister of Rural Development and Land Reform has the authority to expropriate land.[204]

The Expropriation Act *inter alia*, grants the relevant expropriator the authority to expropriate;[205] it sets out the procedure for expropriation;[206] and it determines how compensation for an expropriation should be determined.[207] However, the current Expropriation Act predates the Constitution by more than 40 years. Accordingly, the

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of expropriation can be found in chapter 13 of the National Water Act 36 of 1998 or where land is acquired by a labour tenant in terms of chapter 3 of the Land Reform (Labour Tenants) Act 3 of 1996. In terms of the latter, the expropriator acquires the property by way of an administrative action.

198 Since expropriation is an administrative action, it also needs to comply with the provisions of the Promotion of Administrative Justice Act 3 of 2000.

199 Van der Walt *Constitutional Property Law* 456; Hoops *The Legitimate Justification of Expropriation* 376-378; Gildenhuys *Onteieningsreg* 13-15, 49.

200 As mentioned above, authorising legislation includes sections 10, 10A and 12 of the Land Reform: Provision of Land and Assistance Act 126 of 1993; section 26 of the Extension of Security Tenure Act 62 of 1997; part 4, section 9 of the Housing Act 107 of 1997; section 2 read with the definition of "acquire" in the definition list of the Eastern Cape Disposal Act 7 of 2000; sections 22, 35, 42A, 42C and specifically section 42E of the Restitution of Land Rights Act 22 of 1994; section 3 of the Land Reform (Labour Tenants) Act 3 of 1996; and clause 26 of the Regulation of Agricultural Land Holdings Bill.

201 Gildenhuys *Onteieningsreg* 51.

202 Section 2(1) of the Expropriation Act 63 of 1975. Clause 3 of the Draft Expropriation Bill B-2019 also provides that the Minister of Public Works may expropriate property.

203 Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 191; Southwood *The Compulsory Acquisition of Rights* 36-46, where the author lists examples of expropriating authorities and the corresponding legislation that authorises the expropriation. See for example, section 15 of the Broadcasting Act 73 of 1976; section 79 of the Post Office Act 44 of 1958; section 19 of the Electricity Act 41 of 1987; section 27 of the Nuclear Energy Act 131 of 1993; sections 3 and 39 of the National Parks Act 57 of 1976; section 14 of the Conservation of Agricultural Resources Act 43 of 1983; section 64 of the National Water Act 36 of 1998. See also Van der Walt *Constitutional Property Law* 456; Gildenhuys *Onteieningsreg* 51-57; H Mostert "Revising the procedure for expropriation in South Africa: 2015 Bill and 1975 Act compared" (2016) 5 *European Property Law Journal* 170-205.

204 Clause 26(2)(3) of the Regulation of Agricultural Land Holdings Bill.

205 Sections 2-5 of the Expropriation Act 63 of 1975 and clause 3 of the Draft Expropriation Bill B-2019. Both the Act and the Bill provide that the Minister of Public Works may expropriate property.

206 Sections 6-11 of the Expropriation Act and chapters 3-5 of the Expropriation Bill B4-2015 in general. For an explanation of the procedure under the Expropriation Act, see Southwood *The Compulsory Acquisition of Rights* 49-74; Gildenhuys *Onteieningsreg* 111-136. For an explanation of the procedure under the Expropriation Bill, see J van Wyk "Compensation for land reform expropriation" (2017) 1 *Tydskrif vir Suid-Afrikaanse Reg* 21-35, 22-23.

207 Sections 12, 13 and 14 of the Expropriation Act 63 of 1975. See also Southwood *The Compulsory Acquisition of Rights* 49; Gildenhuys *Onteieningsreg* 75.

Expropriation Act is only valid insofar as it complies with the constitutional provisions of sections 25(2) and 25(3) of the Constitution.[208]

A series of legislative attempts[209] aimed at bringing the pre-constitutional legislation on expropriation in line with the provisions of the Constitution have been drafted. The most recent Expropriation Bill[210] was published in December 2018.

Once promulgated, expropriations will be subject to the provisions of the 2019 Expropriation Bill. In this regard, Mostert postulates that:

> "even if a…[Expropriation Act]… enters into force, the power of existing precedent may influence [the] understanding of [the] new and adapted provisions".[211]

Accordingly, the elements of an expropriation will be discussed in accordance with both the Expropriation Act and the 2019 Expropriation Bill.

The Expropriation Bill proposes, like the Expropriation Act, that the authorising body should be the Minister of Public Works.[212] Again, other laws may also authorise other bodies to expropriate property.[213] Even though the Minister of Rural Development and Land Reform has the authority to expropriate land,[214] in terms of the Regulation Bill, it is more than likely that the procedure set out in the Expropriation Act[215] or the Expropriation Bill (when

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[208] Mostert (2016) *EPLJ* 173 where the author argues that it is not problematic *per se* that the Expropriation Act still prevails because "the Expropriation Act is subject to mechanisms of interpretation (reading in, reading down, severance, etc) that must ensure that these statutes align with the Constitution". See I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 58-59, 185 and AJ van der Walt *Property and Constitution* (2012) 20, 121; Mostert "The poverty of precedent on public purpose/interest" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 63. The aim of the Expropriation Bill in this regard is to ensure consistency with the Constitution and uniformity of procedure for all expropriations.

[209] There have been numerous attempts to repeal the 1975 Expropriation Act. See Expropriation Bill B16-2008 in *GG* No 30963 of 11-04-2008; Expropriation Bill GN 234 in *GG* 36269 of 20-02-2015; the Expropriation Bill B4-2015 in *GG* 34818 of 26-01-2015 and the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018. See also Slade (2017) *De Jure* 346-362, 348 in this regard.

[210] B-2019 in *GG* No 42127 of 21-12-2018.

[211] Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 63.

[212] Clause 3-4 of the Draft Expropriation Bill B-2019. See also Mostert (2016) 5 *EPLJ* 182-183.

[213] Southwood *The Compulsory Acquisition of Rights* 36-46, specifically See also Van der Walt *Constitutional Property Law* 456; Gildenhuys *Onteieningsreg* 51-57; Mostert (2016) 5 *EPLJ* 170-205.

[214] Clause 26(2)(3) of the Regulation of Agricultural Land Holdings Bill.

[215] For an indication of the procedure see Southwood *The Compulsory Acquisition of Rights* 49-74; Gildenhuys *Onteieningsreg* 111-136; Van Wyk (2017) *TSAR* 22-23.

promulgated),[216] will be followed for the expropriation of agricultural land (specifically "redistribution agricultural land").[217]

3 2 2 Public purpose or public interest

Section 25(2) of the Constitution states that expropriations may only be effected for a public purpose or in the public interest.[218] An expropriation that satisfies either the public purpose or public interest requirement will constitute a valid expropriation as long as all of the other requirements are also met.[219]

In this regard, the Constitution does not provide for a definition of public purpose.[220] However, the Expropriation Act states that public purposes includes "any purposes connected with the administration of the provision of any law by an organ of State".[221] Generally, "public purpose" includes purposes such as the building of public roads, hospitals and schools.[222] Presently, the Expropriation Act only provides for expropriation for public purposes.[223]

Likewise, the Constitution refrains from providing a definition of public interest. However, some indication of the meaning of public interest is provided for in section 25(4)(a) of the Constitution. "Public interest", as determined by section 25(4)(a) of the Constitution "includes

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[216] The procedure set out in the Draft Expropriation Bill B-2019, comprises of three phases: (a) the investigation, gathering of information and valuation of property; (b) the notice of intention to expropriate; and (c) the notice of expropriation, before property may be expropriated. However, it is not the purpose of this dissertation to analyse the expropriation procedure in terms of the Expropriation Bill. For a discussion of the procedure set out in the Expropriation Bill B4-2015, which is similar to the procedure set out in the Draft Expropriation Bill B-2019 see Van Wyk (2017) *TSAR* 31-34 and Mostert (2016) *EPLJ* 188-203. For a discussion on the procedure set out in the Draft Expropriation Bill B-2019 see JM Pienaar "Land Reform: October to December" (2018) *Juta Quarterly Review* 1-8, 1-5.

[217] In terms of the definition list in the Regulation of Agricultural Land Holdings Bill "Redistribution agricultural land" means all agricultural land that falls between or exceeds any category of agricultural land holdings contemplated in section 25. See Chapter 3, 3 3 3 1 8 above for a discussion on "redistribution agricultural land".

[218] See in general BV Slade "Public purpose or public interest and third party transfers" (2014) 17 *Potchefstroom Electronic Law Journal* 167-206 and XH Nginase *The meaning of 'public purpose' and 'public interest' in section 25 of the final Constitution* LLM thesis, Stellenbosch University (2009). See further E (WJ) du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 369-387; Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 196-197 where the author states that the public purpose requirement in section 25(2)(a) should not be confused with the role that public purpose plays in determining compensation under section 25(3)(e) of the Constitution.

[219] Van der Walt *Constitutional Property Law* 462; Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 59.

[220] Slade (2014) *PELJ* 171.

[221] Section 1 of the Expropriation Act 63 of 1975.

[222] See *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) paras 124-125.

[223] Section 2 of the Expropriation Act 63 of 1975.

the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources".[224]

The Expropriation Bill defines both public purpose and public interest.[225] Interestingly, the definition of public purpose is exactly the same as the definition provided for in the Expropriation Act and the definition of public interest is a replica of the wording of section 25(4)(a) of the Constitution.[226] Slade points out that there is thus no clearer indication of what would qualify as an expropriation for a public purpose or an expropriation in the public interest, especially when it involves a third party transfer.[227]

"Expropriation for land reform purposes constitutes an expropriation for the benefit of another private person or a group of persons".[228] In this regard, the constitutionality of transferring expropriated property to third parties for land reform purposes has not yet been challenged.[229] Where the property is expropriated and transferred to a third party for the third parties' own use and benefit, it would ordinarily not pass the public purpose or public interest requirement.[230] Nevertheless, the expropriation and transfer to third parties for land reform purposes would still be deemed to be in the public interest because it serves a valid State goal, such as redistribution of agricultural land, which is in the public interest.[231] Mostert notes that:

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[224] Section 25(4) of the Constitution of the Republic of South Africa, 1996; Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 64-65. See also Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 369-387.

[225] The long title of the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018 provides for the expropriation of property for a public purpose or in the public interest. The preamble of the Bill also contains the whole of section 25 of the Constitution. Although "public interest" is defined in the preamble of the Bill, the definition list in clause 1 of the Draft Expropriation Bill B-2019 only provides for a definition of "public purpose".

[226] Compare section 25(3)(a)-(e) of the Constitution of the Republic of South Africa, 1996 with clause 12 of the Draft Expropriation Bill B-2019.

[227] See in particular Slade (2014) *PELJ* 171-172 where the author explains "in certain instances the state is justified to transfer expropriated property to third parties, and these expropriations may be for a valid public purpose or in the public interest. Whether the expropriation and third party transfer is classified as being either for a public purpose or in the public interest may play an important role in signalling the level of scrutiny that the courts should apply in their evaluation of whether the expropriation is justified or not".

[228] Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 64.

[229] Slade (2014) *PELJ* 191; Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 64-65.

[230] Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 64-65; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 340.

[231] Section 25(4) of the Constitution of the Republic of South Africa, 1996. See also Slade (2014) *PELJ* 192; Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 91-92 where the author notes that "[t]he role of public interest…is to enable the execution of social restructuring; to reverse unjust patters of land-holding".

> "The role of public interest…is to enable the execution of social restructuring; to reverse unjust patterns of land-holding".[232]

For purposes of this dissertation it is assumed that expropriation for land reform purposes, such as redistribution of agricultural land, involves third party transfers and is usually regarded as in the public interest.[233] Accordingly, it is not necessary to discuss this element further.

3 2 3 Compensation

3 2 3 1 Compensation for expropriation under the Expropriation Act

As mentioned, pre-1994 legislation is still valid insofar as it is reconcilable with the provisions of the Constitution.[234] This is also true for the determination of compensation for an expropriation.[235]

Under the Expropriation Act, market value played a central role in calculating compensation for an expropriation.[236] Section 12 of the Expropriation Act specifically provides that compensation for property is awarded in terms of: (a) market value;[237] (b) actual financial loss[238] and; (c) a *solatium* amount.[239] Each of these elements are briefly discussed below.

Although the Act does not provide for a definition of market value it provides that compensation should be calculated as the "amount which the property would have realized

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[232] Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 91-92.
[233] Slade (2014) *PELJ* 190-192. See for example, section 42E of the Restitution of Land Rights Act 22 of 1994 which is specifically aimed at authorising the expropriation of land for restitution purposes. It provides that "[t]he minister may purchase, acquire in any other matter or… expropriate land, a portion of land or a right in land" in respect of a claim that has been lodged in terms of this Act. The property expropriated in terms of this Act is to be transferred to the private parties who lodged a claim for restitution in terms of this Act. See also Van der Walt *Constitutional Property Law* 307; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 567; DL Carey Miller & A Pope *Land Title in South Africa* (2000) 301-302; Mostert ""The poverty of precedent on public purpose/interest"" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 64-65, 91-92.
[234] Van der Walt *Constitutional Property Law* 121, 269.
[235] 503.
[236] Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 193-1295 explains that although "the Constitution referes to 'compensation', the Expropriation Act largely treats it as 'value', particularly market value. However, 'compensation' and 'value' are two distrinct concepts. Du Plessis (2015) *PELJ* 1728, 1730; Du Plessis (2014) *PELJ* 801-807.
[237] Section 12(1)(a) of the Expropriation Act 63 of 1975. See also Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 199-202; Van Wyk (2017) *TSAR* 23-24.
[238] Section 12(1)(b) of the Expropriation Act 63 of 1975. Van Wyk (2017) *TSAR* 23-24.
[239] Section 12(2) of the Expropriation Act 63 of 1975. See also Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 202; Van Wyk (2017) *TSAR* 23-24.

if sold…in the open market by a willing seller to a willing buyer",[240] which is commonly referred to as market value.[241] Du Plessis explains that there are various problems with calculating market value.[242] For one, she regards the WBWS method for determining market value as illusory, because the negotiation process between the willing buyer (the State or a beneficiary) and the willing seller (the land owner) is constrained by a compulsory sale.[243] Linked hereto is the problem that market value can be regarded as nothing more than an informed guess:[244]

> "…the market is a relatively unrestrained phenomenon where sellers and buyers bargain until they reach an acceptable price level, and such bargaining is usually done without any artificial constraints. The problem thus lies in the fact that one must imagine compensating a compulsory purchase in terms of exactly the opposite, namely a free market transaction where the price level is determined by the relatively free will of the buyer and the seller." [245]

Furthermore, market price is not static, which makes it difficult to accurately pinpoint the compensation amount.[246] Changes over time may influence the market price.[247] For example, inflation, fluctuations in the demand and supply of property and changes regarding the zoning of the property,[248] may all impact the market price of the property. Furthermore, the choice of valuation method may also influence the market value of the property.[249] Different valuation methods can be used to determine market value within the parameters

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[240] Section 12(1)(a) of the Expropriation Act 63 of 1975. In this regard, Du Plessis (2014) *PELJ* 804 explains that the WBWS approach with regard to compensation for expropriation refers to one (of many) methods to determine market value. See also 3 2 3 5 below where the definition of "market value" under the Property Valuation Act 17 of 2014 and the regulations to the Act is discussed.

[241] WJ du Plessis "Valuation in the constitutional era" (2015) 18 *Potchefstroom Electronic Law Journal* 1726-1759, 1728. However, the court in *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) <http://www.saflii.org/za/cases/ZALCC/2018/1.html> para 21 provides that there is no universal definition for market value. See however 3 2 3 5 below where the definition of "market value" is defined in the Property Valuation Act 17 of 2014 and the regulations.

[242] Du Plessis (2015) *PELJ* 1729-1730.

[243] Du Plessis (2015) *PELJ* 1730; Du Plessis (2014) *PELJ* 805.

[244] 1729.

[245] 1729.

[246] 1729.

[247] 1729.

[248] *Msiza v Director General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC); *Uys v Msiza* 2018 3 SA 440 (SCA) where the primary issue related to the market value of the land in question and whether such land had residential development potential or whether it was agricultural land as the respective valuations differed substantially in worth.

[249] Du Plessis (2015) *PELJ* 1748. See also the regulations under the Property Valuation Act 17 of 2014, which provides for the determination of the "value" of the property.

of section 12.[250] In *Wollach No v Government of the Republic of South Africa*[251] the Court identified (a) the comparative or market data approach; (b) the income investment or economic approach; [252] (c) the land residual technique;[253] and (d) the cost method[254] as different valuation methods to determine fair market value.[255] In terms of the comparable sales or market data approach, the property in question is compared with other similar properties in terms *of inter alia* size, condition, location and improvements. Based on this comparison, the valuer then draws a conclusion on the probable selling price.[256] In terms of the income capitalisation approach, the valuer values the property by capitalising its net rental income.[257] Other variables, such as the value of the improvements to the land and the depreciation of the improvements are taken into account under the cost approach.[258] Accordingly, the consideration of different variables influences the determination of market price. While the comparable sales method or the market data approach is the most common method used to determine market value,[259] the other valuation methods listed above, are generally speaking, not applicable where agricultural land is at stake.[260]

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[250] *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) paras 25-26. See also Du Plessis (2015) *PELJ* 1737; Van Wyk (2017) *TSAR* 23. See furthermore, Gildenhuys *Onteieningsreg* 207-244 for an exposition of the different valuation methods for determining market value. See also 3 2 3 2 below where the role of the Office of the Valuer-General, in determining the "value" of property identified for land reform purposes is discussed. See further *Moloto Community v Minister of Rural Development and Land Reform*, unreported, case no LCC 204/2010, 4 February 2019, Land Claims Court, Randburg <http://www.justice.gov.za/lcc/jdgm/2019/2019-lcc-204-2010.pdf> (accessed 11-09-2019) and *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019) on the interpreting and applying the Property Valuation Act 17 of 2014 and the role of the Office of the Valuer-General.

[251] [2018] ZALCC 1, 15 January 2018 (unreported judgment).

[252] Van Wyk (2017) *TSAR* 23; Du Plessis (2015) *PELJ* 1740-1741. See also A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *The Law of South Africa* 2 ed (RS 31-08-2012) paras 73-82 for the different methods to determine market value. See further the considertations taken into account in determining "value" and "market value" under the regulations to the Property Valuation Act 17 of 2014 at 3 2 3 5 below.

[253] Van Wyk (2017) *TSAR* 23.

[254] Du Plessis (2015) *PELJ* 1741-1742. For alternative methods of determining market value, see Du Plessis (2015) *PELJ* 1743-1747; Gildenhuys & Grobler "Expropriation" in *LAWSA* paras 73-82.

[255] *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) paras 25-26.

[256] Van Wyk (2017) *TSAR* 23; Du Plessis (2015) *PELJ* 1737-1740; Southwood *The Compulsory Acquisition of Rights* 81-82. See furthermore, Gildenhuys *Onteieningsreg* 207-244 for an exposition of the different valuation methods for determining market value.

[257] Du Plessis (2015) *PELJ* 1740. See also the considertations taken into account in determining "value" and "market value" under the regulations to the Property Valuation Act 17 of 2014 at 3 2 3 4 below.

[258] Du Plessis (2015) *PELJ* 1741-1742.

[259] *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) para 26; Van Wyk (2017) *TSAR* 23; Du Plessis (2015) *PELJ* 1737-1740; Southwood *The Compulsory Acquisition of Rights* 81-82; Gildenhuys & Grobler "Expropriation" in *LAWSA* paras 74-79.

[260] *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) para 26; JM Pienaar "Land reform: January to March" (2018) 1 *Juta Quarterly Review* 1-4, 1.

Apart from market value, the Act also makes provision for actual financial loss. Actual financial loss is regarded as the amount for any direct financial loss that is caused by the expropriation.[261] This amount may include expenses or costs relating to the acquisition of a new property; relocation; loss of income while relocating and loss of goodwill.[262]

The Expropriation Act also provides for a *solatium* amount.[263] A *solatium* is a symbolic consolation amount additional to the market value amount, but not additional to the actual financial loss.[264] In this regard, *solatium* must be added to the total amount of compensation payable to the expropriatee.[265]

3 2 3 2 Compensation for expropriation under the Constitution

While the Constitution provides a framework for determining compensation,[266] it is important to note that the provisions of the Constitution dealing with the determination of compensation[267] may change drastically, if the proposed amendments to the Constitution, allowing for expropriation without compensation are realised.[268] However, in light of international and foreign law, it may be argued that there is a general duty to compensate an owner for giving up his/her property for the benefit of the broader society.[269] "Compensation is required for expropriation in most constitutional property clauses in foreign law".[270] Van der Walt notes that there is a "general duty to pay compensation for

[261] Van Wyk (2017) *TSAR* 23; Gildenhuys & Grobler "Expropriation" in *LAWSA* paras 98-103.
[262] Gildenhuys & Grobler "Expropriation" in *LAWSA* paras 98-103.
[263] Section 12(2) of the Expropriation Act 63 of 1975. The Act provides: "Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection (1), an amount equal to - (a) ten per cent of such total amount, if it does not exceed R100 000; plus (b) five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus (c) three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus (d) one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000". See also Gildenhuys & Grober "Expropriation" in *LAWSA* para 106.
[264] Van Wyk (2017) *TSAR* 24. See *Farjas (Prop) Ltd v Minister of Agriculture and Land Affairs* 2013 2 SA 263 (SCA) para 26 where the court stated that "*solatium* awards are by no means automatic". See also *Florence v Broadbeat Investments (Pty) Ltd, Government of the Republic of South Africa and City of Cape Town* (LLC 148/08) [2012] ZALCC 11 (5 June 2012) para 40 where the court confirmed that the purpose of a *solatium* is not financial as such, but symbolic in that it appreciated that the plaintiffs had suffered hardship. In this regard, awarding *solatium* is by no means automatic. Evidence had to be tendered of the hardship caused. See Pienaar *Land Reform* 538-543.
[265] Van Wyk (2017) *TSAR* 24.
[266] Section 25(3) of the Constitution of the Republic of South Africa, 1996. See also Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 192; Du Plessis (2014) *PELJ* 811.
[267] Section 25(3) of the Constitution of the Republic of South Africa, 1996.
[268] See 3 3 below.
[269] Van der Walt *Constitutional Property Law* 505. See also Slade *et al* "Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018).
[270] Van der Walt *Constitutional Property Law* 505.

expropriation, even in the absence of an explicit constitutional provision to that effect" [271] in foreign case law. Therefore, "if there is no express authorisation from the legislation to compensate, the [South African] courts could create such a duty"[272] in future.

The proposed 2019 Expropriation Bill also makes provision for circumstances under which it may be just and equitable to pay nil compensation for land expropriated in the public interest.[273] These developments are discussed below.[274]

As the Constitution is currently formulated, it provides for "just and equitable" compensation,[275] reflecting an equitable balance between the public interest and the interests of those affected.[276] "Just and equitable" is not defined,[277] but the Constitution provides that all relevant circumstances[278] must be taken into account, including the factors listed in section 25(3)(a)-(e) to determine "just and equitable" compensation. These factors include "the current use of the property";[279] "the history of the acquisition and use of the property";[280] "the market value of the property";[281] "the extent of direct State investment and

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[271] Van der Walt *Constitutional Property Law* 505; C Treeger "Legal analysis of farmland expropriation in Namibia" (2004) <https://www.nid.org.na/images/pdf/analysis_views/Legal_analysis_of_farmland_expropriation_in_Namibia.pdf> (accessed 05-02-2019).

[272] Du Plessis *Compensation for expropriation under the Constitution* 34.

[273] Clause 12(3) the Draft Expropriation Bill B-2019.

[274] See 3 3 below.

[275] Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 193-198. See also *Msiza v Director-General, Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 32. In this decision, the Land Claims Court awarded compensation that was less than market value. However, the Supreme Court of Appeal in *Uys NO v Msiza* 2018 3 SA 440 (SCA) overturned the ruling of the Land Claims Court and awarded compensation equal to market value compensation, as it was of the opinion that it was not justified in the circumstances to make a downward adjustment. This decision may point towards a tendency by courts to award market value-related compensation.

[276] Du Plessis (2014) *PELJ* 811-812.

[277] Pienaar *Land Reform* 625, 651. See in general Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 189-220.

[278] Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 194-198; Case-specific considerations or factors may impact the amount of compensation payable. For example, the removal of a fence was considered in the *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 (19 April 2012) paras 74-76 as a factor or circumstance that may impact the amount of compensation payable. The court in *In re: KookFontein Trading Company (Pty) Ltd* (37/2008) 2012 ZALCC 21 (30 November 2012) para 74 also took financial loss into account to determine the amount of compensation payable.

[279] Section 25(3)(a) of the Constitution of the Republic of South Africa, 1996. See also Du Plessis (2015) *PELJ* 1734-1735; Du Plessis (2014) *PELJ* 816-817.

[280] Section 25(3)(b) of the Constitution of the Republic of South Africa, 1996. See also Du Plessis (2015) *PELJ* 1735; Du Plessis (2014) *PELJ* 817.

[281] Section 25(3)(c) of the Constitution of the Republic of South Africa, 1996. See also Du Plessis (2015) *PELJ* 1736; Du Plessis (2014) *PELJ* 817.

subsidy in the acquisition and beneficial capital improvement of the property";[282] and "the purpose of the expropriation".[283] Importantly, market value is but *one* of the considerations to be taken into account to determine just and equitable compensation.[284] In light of the listed factors to be considered to determine "just and equitable" compensation,[285] it is clear that the Constitution envisages a move away from the centrality of market value, as cemented in the Expropriation Act.[286]

The expropriator and the expropriatee can either agree on the amount of compensation by way of negotiation or it can be decided and approved by a court.[287] Interestingly, the WBWS principle for determining compensation may still be applicable in cases where the parties involved in the expropriation can agree on the compensation amount.[288] In cases where there is no agreement, courts are left to determine the compensation amount. For purposes of this dissertation the focus falls on the determination of compensation for an expropriation in the public interest, namely for land reform purposes. In this context, the role of the Office of the Valuer-General ("OVG") is important. As elaborated on below,[289] where any property is identified for purposes of land reform, the OVG *must* value the property "having regard to the prescribed criteria and guidelines".[290] However, it is unclear to what extent the determination of value by the OVG may assist the court in determining just and equitable compensation for an expropriation for land reform purposes.[291] Arguably, the determination

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[282] Section 25(3)(d) of the Constitution of the Republic of South Africa, 1996. See also Du Plessis (2015) *PELJ* 1736; Du Plessis (2014) *PELJ* 817-818.

[283] Section 25(3)(e) of the Constitution of the Republic of South Africa, 1996. Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 196-197. See also Du Plessis (2015) *PELJ* 1736; Du Plessis (2014) *PELJ* 818-819.

[284] Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 196. See for instance *Msiza v Director-General, Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 29 where the court specifically held: "Market value is not the basis for the determination of compensation under section 25 of the Constitution … The departure point for the determination of compensation is justice and equity".

[285] Van Wyk (2017) *TSAR* 35.

[286] Section 12 of the Expropriation Act 63 of 1975. See however, Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 198-199.

[287] Section 25(2)(b) of the Constitution of the Republic of South Africa, 1996; Van der Walt *Constitutional Property Law* 509.

[288] In such cases, the determination of "value" made by the Valuer-General may guide the parties in determining a compensation amount. See *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019) in this regard.

[289] See 3 2 3 5 below.

[290] Section 12(1)(a) of the Property Valuation Act 17 of 2014.

[291] See *Moloto Community v Minister of Rural Development and Land Reform*, unreported, case no LCC 204/2010, 4 February 2019, Land Claims Court, Randburg <http://www.justice.gov.za/lcc/jdgm/2019/2019-lcc-204-2010.pdf> (accessed 11-09-2019) and *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban

of the value of the property could be used by the court, and by the State, as a *guideline* for determining just and equitable compensation where property is acquired for land reform purposes.[292] In light of the uncertainty regarding the relationship, duties and responsibilities of courts, *vis-á-vis* the OVG, courts are inevitably guided by the principles and factors set out in the Constitution to determine compensation for an expropriation for land reform purposes.[293]

Currently, despite possible developments linked to the amendment of section 25 of the Constitution elaborated on in more detail below,[294] the central principle is that the amount of compensation must reflect an equitable balance between the public interest and the individual interests of the private land owner.[295] Courts must establish this balance by taking into account the relevant circumstances, including those listed in section 25(3), mentioned above.[296] Du Plessis notes that this requires the court to look at each case individually, while taking into account:

> "the individual property interest that might stem from the pre-constitutional era, and the constitutional framework and its legitimate land reform efforts". [297]

However, the courts find the determination of compensation for expropriation for land reform purposes, such as for redistribution, rather challenging.[298] The challenge lies in quantifying

<http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019). The question arises whether the Property Valuation Act 17 of 2014 and the determination of value by the Valuer-General ousts the jurisdiction of the court to determine just and equitable compensation. From these two judgments it is clear that clarity regarding the impact of the Property Valuation Act remain unaddressed. Further clarification, specifically in jurisprudence is needed regarding the exact scope of the Act; when the Act must be used and at what stage of the expropriation process; and what the relationship, duties and responsibilities of courts *vis-á-vis* the Office of the Valuer-General and Property Valuation Act are.

[292] There is no provision preventing the Minister from paying compensation that exceeds the value of the property as determined by the Office of the Valuer-General. See *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019) para 35.

[293] Van der Walt *Constitutional Property Law* 272.

[294] See 3 3 2 below.

[295] Du Plessis (2014) *PELJ* 812; Van der Walt *Constitutional Property Law* 509; *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC) para 48; *Msiza v Director-General, Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 65.

[296] Du Plessis (2014) *PELJ* 812.

[297] Du Plessis (2014) *PELJ* 812. See also Van der Walt *Constitutional Property Law* 272, 509.

[298] Van Wyk (2017) *TSAR* 25; Du Plessis (2015) *PELJ* 1733. A valuation made by the Office of the Valuer-General and the regulations under the Property Valuation Act 17 of 2014 may assist a court in determining what constitutes just and equitable compensation.

certain factors[299] and finding a way of applying the different factors and their content[300] in relation to one another.[301] Accordingly, a two-step approach for calculating compensation was formulated in *Ex parte Former Highland Residents; in re: Ash v Department of Land Affairs*.[302] In terms of this two-step approach, Gildenhuys J envisaged market value as the starting point in the application of section 25(3) of the Constitution, because it is one of the few factors that is actually quantifiable.[303] In general, once market value is established, an amount may be added or subtracted as may be required by the other factors to determine just and equitable compensation.[304]

Furthermore, section 25(3) does not provide an exhaustive list of considerations for a court to take into account.[305] For example, Gildenhuys points out that the authorising legislation, in principle, may also provide for relevant factors to be taken into account for the calculation of compensation.[306] Interestingly, the 2019 Draft Expropriation Bill[307] provides for a list of factors that should *not* be taken into account generally to determine the amount of compensation for an expropriation.[308] Some of these factors include: (a) whether the property has been taken without consent of the expropriatee;[309] (b) the special suitability or

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[299] The history of the acquisition and use of the property and the purpose of the expropriation are particularly difficult factors to quantify. See also the regulations to the Property Valuation Act 17 of 2014 discussed at 3 2 3 5 below.

[300] Van der Walt *Constitutional Property Law* 512-520; Southwood *The Compulsory Acquisition of Rights* 79-92; Gildenhuys & Grobler "Expropriation" in *LAWSA* paras 129-133; WJ du Plessis *Compensation for expropriation under the Constitution* LLD, Stellenbosch University (2009) 105 where the respective authors provide an exposition of the different factors in section 25(3) of the Constitution and their content.

[301] Du Plessis (2015) *PELJ* 1733.

[302] 2000 2 All SA 26 (LCC).

[303] *Ex parte Former Highland Residents: In Re Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35. This two-step approach has received endorsement: *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 37; *Ex parte Former Highland Residents: In Re Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35, 75; *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) paras 72, 93-100; *Baphiring Community v Uys* 2007 5 14 SA 585 (LCC); *Abrams v Allie NO* 2004 9 BCLR 914 (SCA) and *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA); *Msiza v Director General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 38; *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) para 22; *Uys v Msiza* 2018 3 SA 440 (SCA) para 12. See also Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 214-219; G Budlender "The constitutional protection of property rights" in G Budlender, J Katsky & T Roux *Juta's New Land Law* (1998) 1-60 notes that market value is preferred because it is regarded as "objective". However, it is difficult to determine the exact market value, because there are many variables that need to be considered. See also Du Plessis (2014) *PELJ* 813; Van Wyk (2017) *TSAR* 21-35 in general.

[304] *Ex parte Former Highland Residents; in re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35. See also *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 37 and *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) para 22 where the same formula was used to calculate compensation.

[305] Van der Walt *Constitutional Property Law* 508-510.

[306] Gildenhuys *Onteieningsreg* 170. Unfortunately, the Expropriation Act does not provide for "relevant factors" to be taken into account to determine the calculation of the compensation.

[307] B-2019 in *GG* No 42127 of 21-12-2018.

[308] Clause 12(2) the Draft Expropriation Bill B-2019.

[309] Clause 12(2)(a) the Draft Expropriation Bill B-2019.

usefulness of the property for which it is required, provided that it would have been unlikely that the property would have been purchased for that purpose in the open market;[310] and (c) improvements made to the property after the date on which the expropriation notice was served on the expropriatee.[311]

3 2 3 3 Compensation for an expropriation in land reform cases

Importantly, in suitable cases, it is also possible that expropriation may be just and equitable without any compensation or extremely low compensation.[312] Van der Walt explains that this may be the case where:

> "…the property was acquired in an inequitable manner in the first place, or where the state funded or subsidised the acquisition and development of the property to such an extent that it would be inequitable to require compensation".[313]

It is furthermore questioned whether an expropriation undertaken for land reform purposes will justify the absence of compensation in all cases.[314] Even where property is expropriated for land reform purposes, all the relevant circumstances and factors, including those listed in section 25(3) of the Constitution should be considered holistically to determine whether it would be just and equitable to pay no compensation or extremely low compensation.[315] In this regard Van der Walt explains that in the context of section 25 of the Constitution as a whole:

> "…one factor, such as the purpose of the expropriation, should not be sufficient on its own to justify the absence of compensation, just as one factor (like the market value of the property) should not be sufficient on its own to determine the necessity or amount of compensation".[316]

Du Plessis notes that case law shows that courts tend to conflate the public purpose or public interest *requirement*, under section 25(2) of the Constitution, with the purpose of the expropriation as a *factor* to be taken into account when determining just and equitable

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[310] Clause 12(2)(b) the Draft Expropriation Bill B-2019.
[311] Clause 12(2)(d) the Draft Expropriation Bill B-2019.
[312] Van der Walt *Constitutional Property Law* 506-508. See for example, *Nhlabhati v Fick* 2003 7 BCLR 806 (LLC) paras 32-35 where the effect of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 may be regarded as an expropriation of a right, even though the court did not decide the case on this basis. See further W du Plessis, N Olivier & J Pienaar "Expropriation, restitution and land redistribution: An answer to land problems in South Africa?" (2003) 18 *South African Public Law* 491-514, 501-504.
[313] Van der Walt *Constitutional Property Law* 506.
[314] 506.
[315] Van der Walt *Constitutional Property Law* 506-507.
[316] 506.

compensation.[317] In particular, it is questioned whether the "purpose of the expropriation" factor justifies expropriation without compensation merely because the expropriation is aimed at constitutionally legitimate public purpose or public interest such as land reform.[318] For example, in *Du Toit v Minister of Transport*[319] the High Court reasoned that the public purpose, namely building of roads, would be frustrated if the full market value of the gravel being expropriated were to be paid to the owner.[320] The market value compensation was reduced markedly because it was argued that "a fairer balance between the public interest and the interest of the expropriated owner" would be struck,[321] even though the case had no bearing on land reform or greater access to land rights. Van der Walt explains that, where the section 25(2)(a) public purpose requirement justifies the expropriation in the first place, it should not also justify a reduction of the compensation amount in terms of the section 25(3)(e) factor, "unless there is a special reason such as land reform involved."[322] This statement supports Du Plessis's argument that section 25(3)(e), the purpose of the expropriation factor, should only have an influence on the amount of compensation in circumstances that deal with social transformation and equitable access to resources.[323]

Accordingly, it is important to distinguish between the justification or purpose of the expropriation as a *requirement* for a valid expropriation in terms of section 25(2)(a) of the Constitution and the purpose of the expropriation as a *factor* to consider in the determination of the amount of compensation to be paid for an expropriation in terms of section 25(3) of the Constitution.[324] The interpretation[325] and application of the various factors may influence the calculation of compensation. These factors, in relation to agricultural land specifically, are thus discussed briefly below. Importantly, the regulations to the Property Valuation Act

[317] E (WJ) du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 369-387, 376-377; Van der Walt *Constitutional Property Law* 514-518.
[318] Van der Walt *Constitutional Property Law* 517.
[319] 2006 1 SA 297 (CC).
[320] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 51.
[321] Van der Walt *Constitutional Property Law* 515.
[322] Van der Walt *Constitutional Property Law* 515.
[323] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380.
[324] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 376-377.
[325] See Gildenhuys *Onteieningsreg* 170-179; Budlender "The constitutional protection of property rights" in *Juta's New Land Law* 56-64 on the interpretation of these considerations in particular.

17 of 2014 ("PVA"), elaborated on and discussed separately below,[326] also provide some content to each factor by providing for the determination of the "value" of each factor.[327]

3 2 3 3 1 Current use of the property

Current use of the property[328] should be distinguished from historical use of the property[329] and from its future use.[330] Generally, this factor requires a determination of the use of the property on the date of expropriation.[331]

It is argued that this factor may be significant to justify expropriation of scarce resources such as agricultural land for the establishment of emerging commercial black farmers, if the land is not used in a productive manner.[332] However, this factor cannot be used as a punitive measure, because doing so would not constitute a public purpose or be in the public interest.[333] A land owner "cannot be punished for using the land in a certain way".[334] For example, if an owner is not using agricultural land for agricultural purposes, this should not justify a downward adjustment of compensation *per se*. Instead, it remains necessary to balance the interest of those affected with the public interest.[335]

3 2 3 3 2 The history of the acquisition and use of the property

It is not only the current use of the property that can influence the compensation amount, but also the historical use and the acquisition of the property. This factor entails a determination of when the property was acquired; from whom; for what price; on what terms

[326] See 3 2 3 5 below.
[327] See for example regulation 5 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) which provides for the criteria and/or procedures for the valuation of property identified for land reform purposes. The regulations make provision for determining "current use value"; "historical value"; "market value"; and "direct state investment and subsidies".
[328] Section 25(3)(a) of the Constitution of the Republic of South Africa, 1996. See also regulation 5 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) for determining "current use value" of the property.
[329] See section 25(3)(b) of the Constitution of the Republic of South Africa, 1996. Regulation 5 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) for determining the "historical value" of the property.
[330] Van Wyk (2017) *TSAR* 28; *Msiza v Director General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 52.
[331] Van Wyk (2017) *TSAR* 28.
[332] Budlender "The constitutional protection of property rights" in *Juta's New Land Law* 59; Van der Walt *Constitutional Property Law* 512; Du Plessis (2014) *PELJ* 816; Gildenhuys *Onteieningsreg* 172.
[333] G Budlender "The constitutional protection of property rights" in G Budlender, J Latsky & T Roux *Juta's New Land Law* (OS 1998) ch 1 48-55, 59; Van der Walt *Constitutional Property Law* 512-513; Du Plessis (2015) *PELJ* 1734; Gildenhuys *Onteieningsreg* 172.
[334] Du Plessis (2015) *PELJ* 1734; Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 195; Van der Walt *Constitutional Property Law* 512-513.
[335] Du Plessis (2015) *PELJ* 1734-1735; Du Plessis (2014) *PELJ* 816-817.

and how the acquisition was financed.[336] For example, in cases where the apartheid government expropriated property and sold (or rented) it to white commercial farmers, usually at a price below market value, it may justify a downward adjustment of compensation.[337] Accordingly, in such cases it would be unfair to offer full market value to a land owner, because it would allow the land owner to benefit twice from the apartheid regime.[338]

3 2 3 3 3 Market value

Although market value is no longer the main consideration to take into account when calculating compensation,[339] it can still be determined by traditional valuation methods.[340] Accordingly, the jurisprudence developed to determine market value under the Expropriation Act is still applicable.[341] Where agricultural land is at stake, the comparable sales method will generally be used to determine the market value of the land, as the other valuation methods listed above[342] are ordinarily not applicable in relation to agricultural land.[343] With respect to where the concept of "market value" had been defined by way of legislation, these particular measures have to be interpreted and applied where relevant. Arguably this particular factor should therefore not pose any new challenges apart from weighing it up in relation to the other factors.[344]

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[336] Van Wyk (2017) *TSAR* 28-29. Regulation 5 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) for determining the "historical value" of the property.

[337] See *Msiza v Director General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 53; Van der Walt *Constitutional Property Law* 512-513; Du Plessis (2014) *PELJ* 817; Gildenhuys *Onteieningsreg* 172; Budlender "The constitutional protection of property rights" in *Juta's New Land Law* 59-60. See further Du Plessis (2015) *PELJ* 1735; Southwood *The Compulsory Acquisition of Rights* 79-80; Van Wyk (2017) *TSAR* 29.

[338] See *Msiza v Director General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 53; Van der Walt *Constitutional Property Law* 512-513; Du Plessis (2014) *PELJ* 817; Gildenhuys *Onteieningsreg* 172; Budlender "The constitutional protection of property rights" in *Juta's New Land Law* 59-60.See further Du Plessis (2015) *PELJ* 1735; Southwood *The Compulsory Acquisition of Rights* 79-80; Van Wyk (2017) *TSAR* 29.

[339] Van der Walt *Constitutional Property Law* 513.

[340] See 3 2 3 1 above where the different valuation methods or approaches are briefly listed. See section 12 of the Expropriation Act 63 of 1975. See also Van Wyk (2017) *TSAR* 28; Du Plessis (2014) *PELJ* 817; Du Plessis (2015) *PELJ* 1736; Van der Walt *Constitutional Property Law* 513; Gildenhuys *Onteieningsreg* 174-176.

[341] See 3 2 3 1 above. See also, regulation 5 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) for the determination of the "market value" of the property.

[342] See 3 2 3 1 above.

[343] *Wollach No v Government of the Republic of South Africa* [2018] ZALCC 1, 15 January 2018 (unreported judgment) para 26; JM Pienaar "Land reform: January to March" (2018) 1 *Juta Quarterly Review* 1-4, 1.

[344] Gildenhuys *Onteieningsreg* 174-176; Van der Walt *Constitutional Property Law* 513. See also regulations 5 and 6 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) for calculating the value of the property.

3 2 3 3 4 Direct State investment/ subsidy

The history of the acquisition and the use of the property may overlap with this factor.[345] The extent of direct[346] State investment and subsidy in the acquisition and/or beneficial capital improvement in the property refers to instances or the practice where the apartheid government directly assisted white farmers with grants and subsidies, through institutions such as the Land Bank,[347] to acquire and develop land expropriated in terms of apartheid land legislation.[348]

Another example of former State investment, which may be regarded as controversial, is the development and consolidation of homeland[349] and rural areas.[350] Coka explains that:

> "According to the [Tomlinson] Commission's 1954 report, the reserves were incapable of supporting South Africa's black population without significant enlargement and *state investment*; therefore, homeland consolidation was a way of improving agricultural conditions in them".[351] (own emphasis)

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[345] Van Wyk (2017) *TSAR* 29.

[346] Van der Walt *Constitutional Property Law* 513-514. Indirect investments through tax benefits are probably excluded because they are too difficult to calculate. See also regulation 5 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) for determining the value of "direct state investment and subsidies".

[347] The Land and Agricultural Development Bank of South Africa is a government-owned juristic person, established in terms of the Land and Agricultural Development Bank Act 18 of 1912, as repealed by the Land Bank Act 13 of 1944 which in turn was repealed by the Land and Agricultural Development Bank Act 15 of 2002. Despite the repeal of the earlier Acts the Bank established in 1912 continues to exist. It is the leading agricultural financier in South Africa since its inception in 1912. It offers financial services to establish emerging farmers and to provide financial assistance to farmers in general. See also section 3 which sets out the objectives of the Act.

[348] For example, the Group Areas Act 41 of 1950; 77 of 1957 and 36 of 1966 and Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 created black and white areas where people were statutorily prevented from owning and using land in an area that was assigned to another group. See Van der Walt *Constitutional Property Law* 513; Van Wyk (2017) *TSAR* 29; Gildenhuys *Onteieningsreg* 176-177; Southwood *The Compulsory Acquisition of Rights* 89; Budlender "The constitutional protection of property rights" in *Juta's New Land Law* 48-55, 60. See also chapter three of Pienaar *Land Reform* in general.

[349] Z Coka "Homeland consolidation: A forerunner for land reform?" (2018) *Farmer's Weekly* 6-7 defines "homeland consolidation" as "the process through which the reserves (territories set aside for black South African and South West African inhabitants as part of the policy of apartheid) were expanded" by way of legislative means and State investment. See further Pienaar *Land Reform* 115-124. White land owners also lost their land for purposes of homeland consolidation. However, these owners where able to lodge restitution claims unde the Restitution of Land Rights Act 22 of 1994. See *Department of Land Affairs v Witz, In re Various Portions of Grassy Park* 2006 1 SA 86 (LCC) and *Randall v Minister of Land Affairs, Knott v Minister of Land Affairs* 2006 3 SA 216 (LCC) which were the first reported cases dealing with restitution claims lodged by persons belonging to the White group.

[350] Coka (2018) *Farmer's Weekly* 6-7 provides that "homeland consolidation was called for by the Tomlinson Commission, which was appointed by the South African government to study the economic viability of the reserves (later Bantustans) in which the government intended to confine the black population".

[351] Coka (2018) *Farmer's Weekly* 6-7. See also Pienaar *Land Reform* 114-115; W Beinhart *Twentieth century South Africa* (2001) 224.

Coka further explains that, although the consolidation of the homeland areas played an important role in the process of dispossession, "the reality is that it made some commercial farmland available to black people".[352] In this regard, it would be unfair to compensate the land owner at full market value for land that was acquired and/or subsequently developed with the financial and other assistance of the apartheid government.[353]

3 2 3 3 5 The purpose of the expropriation

As is evident from the case law discussed below, public purpose or public interest is not only a requirement for a valid expropriation,[354] but it is also a factor that can influence the amount of compensation to be paid.[355] The purpose of the expropriation, as a requirement for a valid expropriation, is complemented by section 25(4)(a) of the Constitution, which provides for the nation's commitment to land reform. In this regard, section 25(4)(a) circumscribes the content of public interest, while section 25(3)(e) deals with the role the purpose of the expropriation plays in compensation. This should also be distinguished from section 25(2), which provides for the public purpose or public interest requirement for a valid expropriation.[356]

As mentioned above, case law shows that the courts tend to confuse the public purpose or public interest *requirement*, under section 25(2) of the Constitution, with the purpose of the expropriation as a *factor* to be taken into account when determining just and equitable compensation.[357] For example, as mentioned above, the Court in *Du Toit v Minister of Transport*[358] attached too much weight to the public interest consideration and too little to the affected owner, without a special justification such as land reform,[359] for doing so in the

[352] Coka (2018) *Farmer's Weekly* 6-7. See also Pienaar *Land Reform* 114-115; Beinhart *Twentieth century South Afica* 224.
[353] Van der Walt *Constitutional Property Law* 513; Du Plessis (2015) *PELJ* 1736; Du Plessis (2014) *PELJ* 818.
[354] See 3 2 2 above.
[355] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 376-377. See however regulation 5 under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018) which merely states that the valuer must record the "purpose of the acquisition". No guidance is given regarding the extent to which this factor should influence the determination of the value of the property.
[356] See 3 2 2 above.
[357] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 376-377.
[358] 2003 1 SA 586 (C); *Minister of Transport v Du Toit* 2005 1 SA 16 (SCA) and *Du Toit v Minister of Transport* 2006 1 SA 297 (CC), which followed the approach for determining compensation as set out in *Khumalo v Potgieter* 2000 2 All SA 456 (LCC). See 3 2 3 3 above.
[359] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380 explains that section 25(3)(e) of the Constitution should only apply where there is a "unique" purpose, such as the realization of social justice, social transformation and equitable access to land.

specific case.[360] Accordingly, market value was reduced markedly because of the purpose of the expropriation.

Conversely, in *Mhlanganisweni Community v Minister of Rural Development and Land Reform*,[361] ("*MalaMala*") which serves as an example of an expropriation for land reform purposes,[362] the Court noted that some legal writers have argued that the intention of making the purpose of an expropriation a factor to be considered in the determination of just and equitable compensation, is to decrease the amount of compensation by relying on section 25(8) of the Constitution.[363] On the one hand, it can be argued that the amount of compensation required for an expropriation may fall outside the State's available resources and therefore constitute a fundamental impediment to land reform.[364] In such circumstances, a reduction in terms of the amount of compensation to be paid may be justified in terms of section 25(8) of the Constitution. However, on the other hand, the purpose of the expropriation is already taken into account when justifying the expropriation under section 25(2)(a) of the Constitution, and should therefore not override other factors in determining the amount of compensation.[365] However, the Court found that there is:

> "[N]o logical reason why a land owner whose property is expropriated for purposes of land reform, should receive less compensation than a land owner whose property is expropriated for a more mundane purpose, such as a storage dam; a school or a hospital…Land reform in the public interest does not rank superior to any other legitimate purpose for which property may be expropriated, and the determination of compensation in cases of land reform must not be different".[366]

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[360] Van der Walt *Constitutional Property Law* 514-517 where the author criticises the court's determination of compensation in the *Du Toit* cases. See also AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" (2006) 123 *South African Law Journal* 23-40.

[361] [2012] ZALCC 7 (19 April 2012) (commonly known as the *MalaMala* case) para 73. The *MalaMala* case was set down for hearing in the Constitutional Court in 2014. However the matter was withdrawn, because the State settled it outside of court. The State paid full market value. Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 379 notes that this shows that the State prefers market solutions above other solutions when it comes to acquiring land for land reform purposes.

[362] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 377.

[363] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 (19 April 2012) paras 71-72. See Van der Walt *Constitutional Property Law* 507.

[364] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 (19 April 2012) para 72.

[365] Para 72.

[366] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 73; Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 378.

The Court held that the fact that land is expropriated for land reform purposes cannot by itself warrant a smaller amount of compensation than would have been payable to the land owner if it was expropriated for any other purpose.[367] Accordingly, the Court held that full market value compensation be paid to the land owner.[368] Based on this decision, it would mean that the determination of compensation in land reform cases should not be treated differently from determining compensation for any other expropriation.[369] However, this judgment was handed down before regulations were issued under the PVA.

Accordingly, in light of the misconstrued interpretation and application of section 25(3)(e) in case law, Du Plessis provides for an alternative interpretation of the purpose of the expropriation factor.[370] She postulates that, when determining compensation, a better approach would be to consider the purpose of the expropriation only in circumstances that deal with "social transformation and equitable access to resources",[371] such as land reform cases. She explains that:

> "The reference to the context and history in Section 25(3)(b) makes it clear that there is a specific aim that compensation must fulfil, a specific Apartheid wrong that must be made right, a precaution against allowing the beneficiaries of Apartheid land law to benefit twice (by payment of full compensation)."[372]

She argues that where an expropriation is effected for "run-of the-mill"[373] public purposes, or non-land reform purposes,[374] such as building a road, railway, school or parking, then "market value would probably be just and equitable since that would struck the balance

[367] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 (19 April 2012) paras 73, 77.
[368] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 (19 April 2012) para 77.
[369] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 378 where the author notes that ironically, this would mean that a lower amount of compensation, as was awarded in the *Du Toit* case, should also be possible in cases of land reform.
[370] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 379-308.
[371] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380; Van der Walt *Constitutional Property Law* 514; Gildenhuys *Onteieningsreg* 178.
[372] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380.
[373] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380.
[374] Van der Walt *Constitutional Property Law* 514-517.

between the public interest and the interests of those affected".[375] Conversely, when property is expropriated for land reform purposes, Du Plessis argues that the purpose of the expropriation may be allowed to play a bigger role in the reduction of market value compensation.[376] Despite being overturned by the Supreme Court of Appeal in *Uys v Msiza*,[377] the reasoning of the Land Claims Court in *Msiza v Director-General, Department of Rural Development and Land Reform*[378] is still relevant for purposes of this section. The Court held that the section 25(3)(e) factor exists primarily to further the objectives of land reform, particularly when read with section 25(8) of the Constitution.[379] Accordingly, the court and academic authors[380] support an interpretation that compensation below market value may be paid in land reform cases,[381] especially in cases where land reform may be impeded by the payment of compensation,[382] provided that all the factors are carefully considered in a holistic, all-encompassing fashion.[383]

Even before the current thrust to amend the property clause to enable expropriation without compensation, the question was raised whether an expropriation undertaken for land reform purposes, would justify the absence of compensation.[384] As mentioned above, a contextual reading of section 25 allows for the interpretation that compensation below market value can be paid in land reform cases, in light of section 25(8) of the Constitution, on condition that all the relevant factors are considered holistically.[385] Van der Walt explains:

> "The fact that the purpose of the expropriation is land reform should…not on its own imply that compensation is not required or that it can be calculated at a special discounted rate, although

[375] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380; Van der Walt *Constitutional Property Law* 514-517.
[376] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380.
[377] 2018 3 SA 440 (SCA).
[378] 2016 5 SA 513 (LCC).
[379] *Msiza v Director-General, Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 66.
[380] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 380; Van der Walt *Constitutional Property Law* 518; Van Wyk (2017) *TSAR* 29.
[381] Van Wyk (2017) *TSAR* 29.
[382] Van der Walt *Constitutional Property Law* 276 explains that if section 25(3)(e) is read together with section 25(8), where the Constitution mandates the State to promote land reform, then such an interpretation would be plausible, especially in cases where land reform may be impeded by the payment of compensation.
[383] Van der Walt *Constitutional Property Law* 506-507.
[384] 506.
[385] Van Wyk (2017) *TSAR* 29.

> this conclusion could indeed follow, in individual cases, upon consideration of *all the relevant circumstances*".[386] (own emphasis)

Accordingly, if section 25 is read as a whole, it can be concluded that one factor, such as the purpose of the expropriation, should not be sufficient to justify the absence of compensation.[387] This position might change in light of the proposed amendment to the Constitution that provides for expropriation without compensation.[388]

3 2 3 4 Compensation for expropriation under the Expropriation Bill

The 2019 Draft Expropriation Bill,[389] is the most recent development in a long line of legislative attempts[390] intended to repeal and replace the current Expropriation Act.[391] Pienaar provides that:

> "Essentially, a new Expropriation Act has been on the table since the commencement of the final Constitution, as the extant Expropriation Act 63 of 1975 (still in use) was not aligned with the basic premises and concepts of the property clause, s 25 of the final Constitution. This was the case because the 1975 Act only provided for expropriation for public purposes, whereas s 25 also authorises expropriation in the public interest. Furthermore, the factors listed in s 25(3) to be taken into account regarding the time, manner and amount of just and equitable compensation were not reflected and embodied fully in the 1975 Act".[392]

[386] Van der Walt *Constitutional Property Law* 518.
[387] Van der Walt *Constitutional Property Law* 506-507.
[388] See 3 3 2 below.
[389] The Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.
[390] There have been numerous attempts to repeal the 1975 Expropriation Act. See Expropriation Bill B16-2008 in *GG* No 30963 of 11-04-2008; Expropriation Bill GN 234 in *GG* 36269 of 20-02-2015; the Expropriation Bill B4-2015 in *GG* 34818 of 26-01-2015 and the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018. See also Slade (2017) *De Jure* 348 in this regard.
[391] JM Pienaar "Land Reform: October to December" (2018) 4 *Juta Quarterly Review* 1-8, 1.
[392] Pienaar (2018) *JQR* 1.

The Expropriation Bill provides for the "expropriation"[393] of "property",[394] of an "owner"[395] and holder of "unregistered rights[396] for a public purpose or in the public interest.

The extent to which the Expropriation Bill revises the payment of compensation for expropriated property may be regarded as the most significant feature thereof. Clause 12(1) of the Expropriation Bill, which relates to the calculation of compensation for an expropriation, is similar to section 25(3) of the Constitution in that it provides that:

> "the amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interest of the expropriated owner or expropriated property holder, having regard to all relevant circumstances…".[397]

The same factors as listed in section 25(3) of the Constitution have to be taken into account when considering all the relevant circumstances. Despite the fact that the Expropriation Bill does not provide further clarity on the interpretation and application of the factors found in section 25(3) of the Constitution, clause 12(2), as mentioned above,[398] makes provision for factors that should generally *not* be taken into account, unless there are special circumstances in which it would be just and equitable to do so.[399]

Given the parliamentary initiative to amend section 25 of the Constitution to enable expropriation without compensation, clause 12(3) specifically provides for categories of land that *may* be expropriated in the public interest for nil compensation, and is thus of particular importance.[400] The provision reads as follows:

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[393] Clause 1 of the Draft Expropriation Bill B-2019.
[394] Clause 1 of the Draft Expropriation Bill B-2019. "Property" is defined as contemplated in section 25 of the Constitution. This coincides with the definition of property provided for in the *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 51. The court in *FNB* opted for a wide definition of property without providing a comprehensive definition. The meaning of property has to be determined in each individual case. Cross reference to chapter 4 where you discuss property for purposes of section 25(1)?
[395] The definition refers to the person in whose name the property or right is registered. See the definition of "owner" in the Draft Expropriation Bill B-2019.
[396] Clause 1 of the Draft Expropriation Bill B-2019. An unregistered right is defined as "a right in property, including a right to occupy or use land, which is recognised and protected by law, but is neither registered nor required to be registered".
[397] Clause 12(1) of Draft Expropriation Bill B-2019 replicates section 25(3) of the Constitution.
[398] See 3 2 3 2 above.
[399] Clause 12(2) of the Draft Expropriation Bill B-2019.
[400] Pienaar (2018) *JQR* 2.

> "It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:
>
> (a) where land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act 3 of 1996;
>
> (b) where the land is held for purely speculative purposes;
>
> (c) where the land is owned by a state-owned corporation or other state-owned entity;
>
> (d) where the owner of the land has abandoned the land;
>
> (e) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land".[401]

Importantly, the circumstances under which payment of nil compensation may be paid relate only to land (and not property in general) expropriated in the public interest, namely for land reform purposes.[402] Pienaar notes that "land", although integral in many parts of the Expropriation Bill,[403] is not defined.[404] Furthermore, the list is not finite, but rather a list of possible situations in which it may be permissible for the State to pay nil compensation. Accordingly, it will not always be just and equitable for the State to pay nil compensation for the listed categories of land.[405] At first glance the listed categories provide more clarity regarding the categories of land that may be considered for expropriation without compensation. However, the Bill is still vague in relation to "(a) the *scope* of the categories and (b) the *result*, in that some compensation may even be paid".[406] In relation to the vagueness surrounding the scope, each category listed above will be briefly explained.

The first category of land, is limited to land occupied by "labour tenants"[407] specifically, and does not include land occupied by other tenants. The process for a labour tenant to become an owner of a parcel of land is provided for in the Labour Tenants Act.[408] To date, the process has been cumbersome in relation to the implementation, administration and

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[401] Clause 12(3) of the Draft Expropriation Bill B-2019.
[402] Pienaar (2018) *JQR* 2.
[403] Compare clause 5(1) where the object is property, in comparison to clauses 5(2) and 12(3) of the Draft Expropriation Bill B-2019 where the object is land.
[404] Pienaar (2018) *JQR* 1-2.
[405] 2.
[406] 2. (Pienaar's emphasis).
[407] See section 1 of the Land Reform (Labour Tenants) Act 3 of 1996. Clause 12(3)(a) of the Draft Expropriation Bill B-2019 where the object is land.
[408] Chapter 3 of the Land Reform (Labour Tenants) Act 3 of 1996.

processing of labour tenancy claims.[409] Accordingly, it is possible that this category of land may impact a large number of labour tenancy claims. In this regard, the Expropriation Bill is unclear in cases where labour tenancy claims have not been finalised.[410]

In relation to the second category, where land is held for purely speculative purposes,[411] it is unclear how and by whom the land will be identified and what criteria for establishing "land held for speculative purposes" will entail.[412] It is also not clear whether rural or urban land will be targeted first under this category.[413]

In terms of the third category, and in light of the State acquisition requirement laid down in *Agri SA*,[414] State-owned land cannot be acquired by way of expropriation, because the land in question already vests in the State.[415] In other words, State-owned land does not have to be expropriated because expropriation is a power that vests with the State alone, and has the effect that the State becomes the owner of the property being expropriated. Pienaar notes that while this category is technically challenging in light of the concept of expropriation, it makes sense if this "category of land is singled out to be put to better use in the public interest",[416] for example, where State-owned land is used for redistribution purposes. There may be cases where the land will have to be transferred from one State department to another. Such a transfer will not constitute an "expropriation" in the strict sense of the word.

The fourth category deals with abandoned land. In this regard, more clarity regarding the type of land, namely urban, rural or agricultural land is required. While there are numerous examples of abandoned buildings on urban land,[417] agricultural land is generally not

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[409] Pienaar (2018) *JQR* 3. See for example, *Mwelase v Director-General, Department of Rural Development and Land Reform* 2017 4 SA 422 (LCC) where the Land Claims Court ordered the appointment of a Special Master to ensure that labour tenancy claims are processed more effectively. The order of the court was replaced by the Supreme Court of Appeal in *Director-General, Department of Rural Development and Land Reform v Mwelase; Mwelase v Director-General, Department of Rural Development and Land Reform* 2019 2 SA 81 (SCA) in terms of which the Court directed the Department to deliver an implementation plan to deal with outstanding labour tenancy claims. Recently however, the Constitutional Court in *Mwelase v Director-General for the Department of Rural Development and Land Reform* (CCT 232/18) [2019] ZACC 30 (20 August 2019) confirmed the appointment of a Special Master.

[410] Pienaar (2018) *JQR* 3.

[411] Clause 12(3)(b) of the Draft Expropriation Bill B-2019.

[412] Pienaar (2018) *JQR* 3.

[413] 3.

[414] 2013 4 SA 1 (CC) para 48. See also Marais (2015) *PELJ* 2983-3031; Marais (2015) *PELJ* 3033-2069; Gildenhuys *Onteieningsreg* 26-27.

[415] Pienaar (2018) *JQR* 3.

[416] 3.

[417] See for example, *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA). See further R Cramer "The abandonment of landownership in South African and Swiss Law" (2017) 134 *South African Law Journal* 870-906.

abandoned by the owner. In the case of agricultural land, the land or parts of the land may appear to be abandoned, but is instead "fallow due to seasonal and planting requirements and schedules".[418] Other difficulties arise regarding the legal position or the status of immovable property once it is abandoned. In this regard, commentators disagree about the classification of land where it is abandoned. There is no consensus on whether the land becomes a *res nullius* or whether it becomes the property of the State (*res publicae)*.[419] Furthermore, it is also extremely difficult to prove that property has indeed been abandoned.[420] Again questions arise relating to how and by whom this category of land will be identified.[421]

The fifth and final category of land requires a determination of (a) the market value of the property and (b) the value of State investment or subsidy in the land.[422] As mentioned above, there are different methods and approaches to determining market value.[423] Importantly, where land is acquired in the public interest (for land reform purposes), "the approach to market value has already been adjusted by way of the Property Valuation Act 17 of 2014"[424] and the corresponding regulations. Accordingly, the provisions of the PVA will play a role in determining the market value of the land in question.[425] Synergy between the PVA and the Expropriation Bill is therefore required in relation to the determination of market value.

3 2 3 5 Compensation for expropriation under the Property Valuation Act 17 of 2014

Although the 2019 Expropriation Bill was drafted, it had not yet been enacted. This lacuna is, however, momentarily filled by another piece of legislation that may be pivotal for determining compensation[426] for expropriations for land reform purposes specifically: The PVA and the Regulations under the PVA.[427]

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[418] Pienaar (2018) *JQR* 3.
[419] Badenhorst, Pienaar & Mostert *The Law of Property* 26, 33, 140-141. See also GJ Pienaar "The effect of original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *Potchefstroom Electronic Law Journal* 1483-1482 and Pienaar (2018) *JQR* 3.
[420] Cramer (2017) *SALJ* 870-906. Van der Merwe *Sakereg* 227; Mostert & Pope (eds) *The Principles of the Law of Property* 141.
[421] Pienaar (2018) *JQR* 3.
[422] 3-4.
[423] See 3 2 3 1 above.
[424] Pienaar (2018) *JQR* 4.
[425] 4.
[426] See however, Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 210-213 who argues that the Property Valuation Act provides for "value" which is not the same as "compensation".
[427] Regulations under the Property Valuation Act 17 of 2014 R 1321 *GG* 42064 (30 November 2018). Valuation for land reform purposes was first introduced in the *Green Paper on Land Reform* (2011) 5-7 followed by the *Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment*

The overarching aim of the PVA is to give effect to the constitutional imperative of land reform and to facilitate land reform by way of regulating the valuation of property which has been identified for land reform purposes.[428] Ultimately, the PVA may facilitate and accelerate land reform.[429] It aims to do so by prescribing the manner in which the price of land is determined for the acquisition thereof. Pivotal and integral in this process is the establishment of the OVG.[430]

Under the new Act, the price of land will be determined by the OVG.[431] The OVG may take into account various considerations for determining the "value"[432] of the land, including the "market value" of the land, which is defined as:

> "the estimated amount for which the property should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion".[433]

The other considerations, similar to those listed in section 25(3) of the Constitution,[434] include the history of the land, its use and the purpose of the acquisition. Arguably, these considerations tend to mitigate for a value lower than market value[435] and presumably this approach will prevent government paying inflated prices for land and that the delays associated with protracted negotiations over price will be obviated. The regulations under the PVA provide for guidelines in calculating market value.[436]

The regulations promulgated to give effect to the PVA, set out the criteria and/or procedures for the valuation of property identified specifically for purposes of land reform.[437] These criteria include: (a) the current use value; (b) historical value; (c) market value; (d) direct State investment and subsidies and (e) the purpose of the acquisition.

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of the Office of the Valuer-General (21 November 2012), which ultimately resulted in the Property Valuation Act 17 of 2014. See Pienaar *Land Reform* 249-254; Van Wyk (2017) *TSAR* 31.

[428] Section 12 of the Property Valuation Act 17 of 2014.

[429] Section 2 of the Property Valuation Act 17 of 2014.

[430] Chapter 2 of the Property Valuation Act 17 of 2014.

[431] Section 6(a) of the Property Valuation Act 17 of 2014.

[432] Section 1 of the Property Valuation Act 17 of 2014 specifically provides for a definition of "value" and "market value" and which considerations may be taken into account for determining the value.

[433] Section 1 of the Property Valuation Act 17 of 2014.

[434] Pienaar *Land Reform* 363.

[435] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 13. JM Pienaar "Land Reform: April to June" (2013) 2 *Juta Quarterly Review* 1-5, 2-3.

[436] Regulation 5(5) under the Property Valuation Act 17 of 2014.

[437] Regulation 5(1) read with section 12(1)(a) of the Property Valuation Act 17 of 2014.

The regulations define “current use value” as:

> “the net present value, as at the date of valuation, of cash inflows and outflows, or other benefits or costs that the subject property generates for the specific owner in perpetuity or, in the case of a lease, to lease expiry, under lawful use, and without regard to its highest and best use, or the monetary amount that might be realised upon its sale”.[438]

When determining the historical value, the regulations provide that the value will “establish the historical value of any acquisition benefits, and escalate the value of these benefits to the valuation date”.[439] In this regard, “acquisition benefits” are defined as:

> “any benefits that accrued to the owner of, and the subject property, because of the manner of acquisition, including that they did not acquire the property at market value and from a willing owner, and where such acquisition and benefit was due to, aided by, or a consequence of past discriminatory laws and practices, or unlawful conduct”.[440]

In determining market value, the valuer shall take into account “any realisable potential and assuming it highest and best use”.[441] Both “realisable potential”[442] and “highest and best use”[443] are defined in the regulations. Under the determination of market value, there is also a list of considerations which a valuer must not take into account:

> “(a) The fact that the property is the subject of an acquisition or expropriation; (b) the special suitability or usefulness of the property for which it is required by the acquiring authority, if it is unlikely that the property would have been purchased for that purpose on the open market; (c) any enhancement in the market value of the property, if such enhancement is the consequence of the use of the property in a manner which is unlawful; (d) any diminution in the market value of the property, if such diminution is a consequence of being encumbered by a mining right, permit or permission, and where such encumbrance took place subsequent to assumption of ownership by the owner of the subject property; (e) anything done with the object of obtaining compensation

[438] See definition of “current use value” in regulation 1 under the Property Valuation Act 17.
[439] Regulation 5(4) under the Property Valuation Act 17 of 2014.
[440] See regulation 1 under the Property Valuation Act 17 of 2014 for a definition of “acquisition benefits”.
[441] Regulation 5(5) under the Property Valuation Act 17 of 2014.
[442] Regulation 1 defines “net realisable value” as “the price of a property that can be realized upon the sale of the property, less a reasonable estimate of costs associated either with the eventual sale or the disposal of the property in question”.
[443] Regulation 1 under the Property Valuation Act 17 of 2014 defines “highest and best use” as the “reasonably, probable and lawful use of property, that is physically possible, financially feasible and that results in the highest value”.

and (f) the value of any movable property, annual crops or growing timber on the subject property, and belonging to the owner, that have not yet been harvested as at the date of valuation".[444]

The valuer may also, in determining the market value of the property, "take into account prices paid by the state".[445] Furthermore, in determining direct State investment and subsidies that can be attributed to specific improvements to the property, value of the direct State investment must be established on "the basis of the replacement cost of those improvements".[446] Where the value of the direct State investment cannot be attributed to specific improvements, the "valuer shall determine the historical cost of state investments and subsidies and escalate the said cost".[447]

Regarding the purpose of the acquisition, the valuer must merely record whether the acquisition of the property is in the public interest or for a public purpose.[448] No value is attributed to this factor.

Once the individual values of these factors are established, the value of the property should be calculated using the formula provided for in the regulations.[449] The formula differs depending on whether the immovable property is acquired with or without movable property, annual crops or growing timber.

If the immovable property is to be acquired with the movable property, annual crops and/or growing timber that have not been harvested, the value should be determined as follows:[450] The value of the movable property, annual crops and growing timber should first be added to the market value. Once this is done, the current use value and market value should be added together and divided by two. The acquisition benefits, the value of the direct State investment and subsidy, and the beneficial capital improvement on the property should then be subtracted from this figure, which will result in the determination of the value of the property.[451]

However, if the immovable property is to be acquired without the movable property, annual crops and/or growing timber that have not be harvested, then the value should be calculated

[444] Regulation 5(6)(a)-(f) under the Property Valuation Act 17 of 2014.
[445] Regulation 5(7) under the Property Valuation Act 17 of 2014.
[446] Regulation 5(10) under the Property Valuation Act 17 of 2014.
[447] Regulation 5(11) under the Property Valuation Act 17 of 2014.
[448] Regulation 5(13) under the Property Valuation Act 17 of 2014.
[449] Regulation 6 under the Property Valuation Act 17 of 2014.
[450] Regulation 6(a) under the Property Valuation Act 17 of 2014.
[451] Regulation 6(a) under the Property Valuation Act 17 of 2014.

as follows:[452] The value of the movable property, annual crops and/or growing timber must first be subtracted from the current use value of the property. Thereafter, the same formula is followed, namely the current use value and market value are added together and divided by two, followed by a subtraction of the acquisition benefits, the value of the direct State investment and subsidy, and the beneficial capital improvement on the property.[453]

Accordingly, the PVA, read with the regulations, provides more legal certainty and clearer guidelines regarding value generally, and market value specifically,[454] where property is acquired for land reform purposes.[455] Although the PVA is useful, "the obligatory valuation of property for land reform purposes may still be complex and time-consuming".[456] In this regard, it is questionable whether the Act, in its present format, will indeed expedite land reform as envisaged.[457]

Furthermore, it is interesting to note that the PVA does not do away with the WBWS principle and the concept of market value *per se*.[458] Where *private* individuals enter into the land market by way of private transactions market value remains that which a buyer and seller would willingly agree on.[459] It is only where land is acquired by the government for land reform purposes that the Valuer-General and the Office become involved.[460] Irrespective of whether it is a private or State transaction, data compiled and developed by the OVG will provide much needed information regarding value of property in South Africa. However, overall, there is no clarity regarding *when* the OVG enters into the expropriation process; *what* the precise role of the OVG is and *whether* cognisance of the value of the property as determined by the OVG has to be taken into account in *all* cases. For example, as mentioned above, it is unclear to what extent the determination of value by the Valuer-General may assist the court in determining just and equitable compensation for an expropriation for land reform purposes.[461] Therefore, the precise impact of the PVA remains unaddressed and requires further elaboration, specifically in jurisprudence.

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[452] Regulation 6(b) under the Property Valuation Act 17 of 2014.
[453] Regulation 6(b) under the Property Valuation Act 17 of 2014.
[454] See definition list in the Property Valuation Act 17 of 2014.
[455] Pienaar (2015) *Scriptura* 14.
[456] Pienaar (2013) *JQR* 2-3; JM Pienaar "Land Reform: January to March" (2014) *Juta Quarterly Review* 1-6, 2.
[457] Pienaar (2014) *JQR* 2.
[458] Pienaar (2013) *JQR* 2.
[459] 2.
[460] 2.
[461] See *Moloto Community v Minister of Rural Development and Land Reform*, unreported, case no LCC 204/2010, 4 February 2019, Land Claims Court, Randburg <http://www.justice.gov.za/lcc/jdgm/2019/2019-lcc-

Clearly, synergy between this Act and the Expropriation Bill, when promulgated, is critical with regard to the identification of property for market evaluation and expropriation purposes. Importantly, the Expropriation Bill does not distinguish between valuation of property for land reform and non-land reform purposes.[462] In this regard, relevant definitions concerning "market value" and "value" as set out in the PVA need to correspond and be aligned with what is deemed "just and equitable" in terms of the Expropriation Bill.[463] "Value", as mentioned above, corresponds and is aligned with the language for the "determination of compensation" under section 25(3) of the Constitution and clause 12(1) of the Expropriation Bill.[464] However, if the provisions in terms of the valuation of property for land reform purposes under the PVA play a "parallel role"[465] to the provisions that determine value for non-land reform expropriations, then "it is the starting point for a determination of compensation for all expropriations in terms of the Expropriation Bill".[466]

The valuation of property in terms of the PVA must also correspond with all the phases dealing with the determination of compensation provided for in the Expropriation Bill, namely the pre-investigation phase, the post-investigation phase and the post-expropriation phase.[467] The PVA, similar to the provisions of the Expropriation Bill, provides that an authorised person may undertake valuations of the property and may serve the notice on the owner of the property.[468] Furthermore, Van Wyk notes that the valuation of the property in terms of the PVA, falls under the investigation phase of the expropriation procedure in the Expropriation Bill.[469] She explains that "if this is the case, land reform expropriations are subjected to the factors twice, first in the valuation in terms of the PVA and then to determine the amount of compensation (later) in the Expropriation Bill".[470]

Van Wyk opines that the procedure in cases of expropriation for land reform purposes is:

204-2010.pdf> (accessed 11-09-2019) and *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019). Unfortunately, these two judgments have not clarified the specific role of the Office of the Valuer General.

462 Van Wyk (2017) *TSAR* 31.

463 Pienaar *Land Reform* 368.

464 Van Wyk (2017) *TSAR* 32.

465 32.

466 Van Wyk (2017) *TSAR* 32.

467 32.

468 Compare chapters 3 and 4 of the Expropriation Bill B4-2015 and chapter 3 of the Property Valuation Act 17 of 2014.

469 Van Wyk (2017) *TSAR* 32.

470 32.

> "unclear and unwieldy, particularly the role played by the valuer-general and the possible duplication in the application of the factors that influence the determination of compensation".[471]

Apart from the alignment between the provisions in the PVA and the Expropriation Bill, the institutional alignment and effective functioning between different officials[472] and functionaries in terms of these legislative developments are furthermore integral to overall efficacy.[473]

3 3 Recent developments: Expropriation without compensation

3 3 1 Introduction

The increasing cry for expropriation of land in the public interest without compensation[474] to broaden access to land and to address the skewed patterns of land ownership in South Africa is evident from two recent developments in the South African context: (a) the process of amending the Constitution to explicitly provide for expropriation without compensation[475] and (b) the Draft Expropriation Bill, which provides for categories of land which may be expropriated without compensation.[476]

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[471] Van Wyk (2017) *TSAR* 35.

[472] The Minister of Rural Development and Land Reform under the Property Valuation Act 17 of 2014) and the Minister of Public Works under the Expropriation Act 63 of 1975 and Expropriation Bill B4-2015 in *GG* 34818 of 26-01-2015 respectively.

[473] Pienaar *Land Reform* 368. See *Moloto Community v Minister of Rural Development and Land Reform*, unreported, case no LCC 204/2010, 4 February 2019, Land Claims Court, Randburg <http://www.justice.gov.za/lcc/jdgm/2019/2019-lcc-204-2010.pdf> (accessed 11-09-2019) and *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019) which has not clarified the specific role of the Office of the Valuer-General. Further clarification, specifically in jurisprudence is needed regarding the exact scope of the Act; when the Act must be used and at what stage of the expropriation process; and what the relationship, duties and responsibilities of courts *vis-á-vis* the Office of the Valuer-General and Property Valuation Act are.

[474] A Constitutional Review Committee has been mandated to explore the options available in this regard. See Government of South Africa, *Minutes of Proceedings of the National Assembly on Tuesday, 27 February 2018* [No 3-2018: Fifth session, Fifth Parliament] 8.

[475] Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution (15 November 2018) <https://www.parliament.gov.za/storage/app/media/Docs/atc/a3985fff-84d0-4109-80f4-e89064c8dede.pdf> (accessed 24-03-2019) 1-28; T Madia "ANC will support constitutional amendment to expropriate land without compensation" (31 July 2018) <https://www.news24.com/SouthAfrica/News/breaking-anc-will-support-constitutional-amendment-to-expropriate-land-without-compensation-20180731> (accessed 24-03-2019); C Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018) <https://www.businesslive.co.za/rdm/politics/2018-08-01-cyril-ramaphosa-we-are-going-to-amend-the-constitution-on-land/> (accessed 24-03-2019); C Ramaphosa "ANC to amend Constitution - read Ramaphosa's statement here" *Times Live* (1 August 2018) <https://www.timeslive.co.za/politics/2018-08-01-in-full--land-reform-anc-to-amend-constitution-read-ramaphosas-statement-here/> (accessed 24-03-2019).

[476] Clause 12(3) of the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018. See 3 2 3 4 above.

3 3 2 Amending the South African Constitution

At the ANC's 54th National Conference held on 21 December 2017,[477] the newly elected ANC leader, Cyril Ramaphosa, stated that expropriation of land without compensation should be among the mechanisms available to the South African government for the redistribution of land.[478] Furthermore, he stated that expropriation without compensation should be implemented in a way that increases agricultural production and improves food security.[479] It was decided that the party's National Executive Committee would start the process to amend section 25 of the Constitution[480] to provide for expropriation without compensation.[481] The National Assembly forthwith adopted a motion to review and possibly amend section 25 of the Constitution.[482] Following this motion, the Joint Constitutional Review Committee ("CRC") was mandated to:

> "embark on a process to establish the views of the public on the possible review of s 25 of the Constitution to allow for the State to expropriate *land* in the *public interest* without compensation".[483] (own emphasis)

Although section 25(4) of the Constitution makes it clear that "property is not limited to land", the motion to review section 25 presumably does not extend to the expropriation of property other than land without compensation. Given that the President stated that expropriation

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[477] The proposal to amend the Constitution to provide for expropriation without compensation was initially only propagated for by the Economic Freedom Fighters (EFF) party.

[478] Madia "ANC will support constitutional amendment to expropriate land without compensation" *News24* (31 July 2018); Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018); Ramaphosa "ANC to amend Constitution-read Ramaphosa's statement here" *Times Live* (1 August 2018). See also T Niselow "Loud cheers as Ramaphosa says #ANC54 unanimous on land reform" *Fin24* (21 December 2017) <https://www.fin24.com/Economy/loud-cheers-as-ramaphosa-says-anc54-unanimous-on-land-reform-20171221> (accessed 12-01-2018); M Merten "#ANCdecides2017: Land expropriation without compensation makes grand entrance" *Daily Maverick* (21 December 2017) <https://www.dailymaverick.co.za/article/2017-12-21-ancdecides2017-land-expropriation-without-compensation-makes-grand-entrance/#.WliLj66WbIU> (accessed 12-01-2018).

[479] Madia "ANC will support constitutional amendment to expropriate land without compensation" *News24* (31 July 2018); Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018); Ramaphosa "ANC to amend Constitution-read Ramaphosa's statement here" *Times Live* (1 August 2018).

[480] See section 74(2) of the Constitution for the procedure to amend the Constitution, specifically the property clause. See also Pienaar "Onteiening sonder vergoeding: Voorvereiste vir suksesvolle grondhervorming of populisme?" *LitNet* (18 January 2018) 1-9.

[481] Madia "ANC will support constitutional amendment to expropriate land without compensation" *News24* (31 July 2018); Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018); Ramaphosa "ANC to amend Constitution-read Ramaphosa's statement here" *Times Live* (1 August 2018).

[482] A Constitutional Review Committee has been mandated to explore the options available in this regard. See Government of South Africa, *Minutes of Proceedings of the National Assembly on Tuesday, 27 February 2018* [No 3-2018: Fifth session, Fifth Parliament] 8.

[483] Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution (15 November 2018) 1.

without compensation should be implemented in a manner that does not impede agricultural production and food security, clarity with regard to the parameters of what would be qualify as "land" is essential. For example, does it refer to rural land (which includes agricultural land) and urban land or is it restricted to the former or the latter? What would the impact be if land with permanent fixtures like houses or apartment blocks on rural and/or urban land is expropriated without compensation? The motion also specifically refers to expropriation of land in the public interest. No reference is made to expropriation for public purposes.[484] It is conceivable that the reference to public interest is limited to an investigation of expropriation for purposes of land reform without compensation, while expropriation for public purposes would still require payment of compensation.

Furthermore, expropriation without compensation blurs the boundaries between expropriation on the one hand, and confiscation of property,[485] on the other, with particular implications. Confiscation embodies a punitive element, carried out in the public interest.[486] However, the approach to redress in the South African land reform programme is distinctively unique[487] and does not incorporate a punitive element. This much was

[484] See above for the distinction between public purpose and public interest.

[485] Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21; Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution: Toward Greater Consensus* 137; Ntsebeza "Land redistribution in South Africa: The property clause revisited" in *The Land Question in South Africa* 107-109. Previously capitals, see also below where I highlighted

[486] Confiscation and forfeiture are often used interchangeably. However, confiscation of property should be distinguished from forfeiture. Similar to confiscation, forfeiture takes place without any compensation to the owner and ownership of the movable or immovable property vests in the State at the moment on which the order for forfeiture is made. However, in *National Director of Public Prosecutions v Rebuzzi* 2002 2 SA 1 (SCA), the court held that orders of forfeiture are not aimed at enriching the State, but to deprive criminals of the proceeds of their crimes. In this regard, various pieces of legislation make provision for forfeiture, including: the Criminal Procedure Act 51 of 1977; the Films and Publications Act 65 of 1886; the Drugs and Trafficking Act 140 of 1992; the Prevention of Organised Crime Act 121 of 1995; and the Proceeds of Crime Act 76 of 1996. In other words, the loss of property in terms of forfeiture is applicable where a crime was committed whereas confiscation is where the State lays claim to and separates property from its owner or holder for a public or State interest, without compensation. The underlying motivation for paying no compensation for the property is to punish criminals for the crimes committed. See Van der Walt & Pienaar *Introduction to the Law of Property* 129-130 where the authors distinguish between forfeiture and confiscation and Van der Walt *Constitutional Property Law* 311-314; Ntsebeza "Land redistribution in South Africa: The property clause revisited" in *The Land Question in South Africa* 107, 122; Cliffe (2000) *Review of African Political Economy* 277-278; FED Belling *Case studies of the changing interpretations of land restitution legislation in South Africa* Magister Technologiae, University of South Africa (2008) 58-63.

[487] JM Pienaar "Land reform and restitution in South Africa: An embodiment of justice?" in J De Ville (ed) *Memory and Meaning* (2015) 141-160.

confirmed in various judgments,[488] most notably by Justice Moseneke in *Florence v Government of the Republic of South Africa*:[489]

> "… compensation…is neither punitive nor retributive. It is not to be likened to a delictual claim aimed at awarding damages that are capable of precise computation of loss on a "but-for" basis… [Compensation is paid] out of public funds in order to find equitable redress to a tragic past. Ultimately, what is just and equitable must be evaluated not only from the perspective of the claimant but also of the State as the custodian of the national fiscus and the broad interests of society, as well as all those who might be affected by the order made."[490]

In this regard, expropriation without compensation (and confiscation) is punitive in nature and contrary to the overall constitutional imperative of healing the divisions of the past and establishing a free and equal society.[491]

It is accepted that it is important to accelerate land reform in order to reach the transformative aspirations of the Constitution and to relieve poverty. However, the tools for effective implementation of land reform already exist. It is imperative that the tools are employed effectively and sustainably, including in an amended or adjusted format.[492] In this regard, it is postulated that an amendment to section 25 is not necessary to ensure effective land redistribution. Instead of amending section 25, it should be exhausted to its full potential, which may allow for a minimal amount of compensation.[493] Accordingly, it is proposed that

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[488] *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC) para 125. The same point was emphasised in *Department of Land Affairs, Popela community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 68 where the court stated: "The claim is against the state. It has a reparative and restitutionary character. It is neither punitive in the criminal sense nor compensatory in the civil law sense. Rather it advances a major public purpose [or public interest] and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt". See also Pienaar JM *Land Reform* 521-525, 836-838.

[489] 2014 6 SA 456 (CC).

[490] *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC) para 125.

[491] Pienaar *Land Reform* 804; BV Slade, JM Pienaar, ZT Boggenpoel & T Kotzé "Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018) <https://www.sun.ac.za/english/PublishingImages/Lists/dualnews/My%20Items%20View/Submission%20to%20Constitutional%20Review%20Committee%20_%20Slade%20Pienaar%20Boggenpoel%20Kotze%20003.pdf> (accessed 15-08-2019).

[492] BV Slade, JM Pienaar, ZT Boggenpoel & T Kotzé "Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018)<https://www.sun.ac.za/english/PublishingImages/Lists/dualnews/My%20Items%20View/Submission%20to%20Constitutional%20Review%20Committee%20_%20Slade%20Pienaar%20Boggenpoel%20Kotze%20003.pdf> (accessed 15-08-2019) 16-17. See also Pienaar "Onteiening sonder vergoeding: Voorvereiste vir suksesvolle grondhervorming of populisme?" *LitNet* (18 January 2018) 1-9; EJ Marais "Is expropriation without compensation really the answer?" *LitNet* (8 February 2018) <http://www.litnet.co.za/onteiening-sonder-vergoeding-werklik-die-antwoord/#1> (accessed 30-05-2018).

[493] Slade *et al* "Submission to the Constitutional Review Committee on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018) 16-17. See also Marais "Is expropriation without compensation really the answer?" *LitNet* (8 February 2018).

the State should use its power to expropriate property for land reform purposes and then refrain from paying market value compensation as is currently the practice.[494] Instead, the boundaries of just and equitable compensation ought to be scrutinised and tested.[495]

In response to the mandate the CRC conducted public hearings,[496] called for public submissions[497] and allowed individuals and organisations to make oral presentations.[498] Despite the fact that the majority of written submissions[499] and oral submissions[500] were opposed to amending the Constitution, the final recommendations of the CRC were in favour of amending section 25 of the Constitution to provide for expropriation without compensation.[501] However, this finding must be viewed in light of the announcement made by the President as the CRC's public hearings reached finality.

On 31 July 2018, before the conclusion of the public participation process and before the CRC could make its final recommendations to Parliament, the President announced, without reference to the parliamentary process, that the ANC will continue with the constitutional amendments to enable the expropriation of land without compensation.[502] While the President accepted that "a proper reading of the Constitution on the property clause enables the State to effect expropriation of land with just and equitable compensation and also expropriation without compensation in the public interest",[503] he concluded that the people of South Africa want the Constitution to *explicitly* provide for expropriation without compensation.[504] The President further elaborated that the goals and intention of the

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[494] Slade *et al* "Submission to the Constitutional Review Committee on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018) 16-17.
[495] Slade *et al* "Submission to the Constitutional Review Committee on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018) 16-17. See also Pienaar "Onteiening sonder vergoeding: Voorvereiste vir suksesvolle grondhervorming of populisme?" *LitNet* (18 January 2018) 1-9; Marais "Is expropriation without compensation really the answer?" *LitNet* (8 February 2018) 1-9.
[496] Public hearings were held from the 26th of June until the 4th of August 2018. Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution (15 November 2018) 1.
[497] The public was allowed to make written submissions from April 2018 until the 15th of June 2015. Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution (15 November 2018) 4-5.
[498] Oral presentations were conducted from the 4-7th of September 2018. Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution (15 November 2018) 7.
[499] Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution (15 November 2018) 25.
[500] 24.
[501] 28.
[502] Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018); Ramaphosa "ANC to amend Constitution-read Ramaphosa's statement here" *Times Live* (1 August 2018).
[503] Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018); Ramaphosa "ANC to amend Constitution-read Ramaphosa's statement here" (1 August 2018).
[504] Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018); Ramaphosa "ANC to amend Constitution-read Ramaphosa's statement here" (1 August 2018).

proposed amendment are to (a) promote redress; (b) advance economic development; and (c) increase agricultural production and food security.[505] Previously, in December 2017, these goals were intended as parameters under which expropriation of land without compensation may be possible.[506] Arguably, this announcement has undermined the democratic and public participation process held by the CRC and the parliamentary process as a whole.

Following the CRC's recommendations and the resolution by both Houses of Parliament that the Constitution should be amended, a parliamentary committee was established to draft a proposed amendment to section 25 of the Constitution.[507] It is unclear what a redrafted section 25 of the Constitution will look like when it is changed to facilitate land expropriation without compensation. The committee was required to report back by 31 March 2019, before the elections in May.[508] However, in light of the committee's draft schedule,[509] it became clear that the issue of amending section 25 of the Constitution will be handed over to the next Parliament, after the elections.[510] Accordingly, the amendment might not be passed if the ANC (and EFF) fail to secure a two-thirds majority between them in Parliament after the elections.[511]

3 3 3 The Expropriation Bill

In December 2018, the Minister of Public Works, published a Draft Expropriation Bill[512] for comment. The Draft Expropriation Bill is believed to give effect to the new expropriation

[505] Ramaphosa "Cyril Ramaphosa: We are going to amend the Constitution on land" *Business Live* (1 August 2018); Ramaphosa "ANC to amend Constitution-read Ramaphosa's statement here" (1 August 2018).
[506] Niselow "Loud cheers as Ramaphosa says #ANC54 unanimous on land reform" *Fin24* (21 December 2017); Merten "#ANCdecides2017: Land expropriation without compensation makes grand entrance" *Daily Maverick* (21 December 2017).
[507] Legalbrief Today "Expropriation without compensation a step nearer" (7 December 2018).
[508] Legalbrief Today "Expropriation without compensation a step nearer" (7 December 2018); B Phakathi "Change to constitution's property clause unlikely to be completed before elections" *Business Live* (22 February 2019) <https://www.businesslive.co.za/bd/national/2019-02-22-change-to-constitutions-property-clause-unlikely-to-be-completed-before-elections/> (accessed 26-03-2019).
[509] According to the committee's draft schedule, the proposed amendment will be published for public comment only during the week of 6 May, two days before the elections. For a summary of the ad hoc committee's programme see C Simkims "The National Assembly's Ad Hoc committee to amend section 25 of the Constitution" (7 March 2019) <https://hsf.org.za/publications/hsf-briefs/the-national-assembly2019s-ad-hoc-committee-to-amend-section-25-of-the-constitution> (accessed 26-03-2019). See further T Didiza "Ad hoc committee adopts reports amending the Constitution" (13 March 2019) <https://www.parliament.gov.za/press-releases/ad-hoc-committee-adopts-report-amending-constitution> (accessed 26-03-2019) where the chairperson of the ad hoc committee confirms that it cannot complete its work in this term of Parliament.
[510] Phakathi "Change to constitution's property clause unlikely to be completed before elections" *Business Live* (22 February 2019).
[511] Phakathi "Change to constitution's property clause unlikely to be completed before elections" *Business Live* (22 February 2019).
[512] Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.

regime, envisaged by the amendment of section 25 of the Constitution.[513] As mentioned above,[514] the Bill provides specifically for categories of land that may be expropriated in the public interest (for land reform purposes) without compensation.

The Bill is merely a draft and still has to go through the parliamentary process before it can be promulgated. Pending the possible amendment to the Constitution, the Bill may also be redrafted in order for it to be aligned better.

4 Confiscation

4 1 Introduction

Confiscation is defined differently, in a variety of legislative measures, for different purposes. Generally, property is confiscated for the purpose of protecting public health and safety.[515] However, it is questionable whether property can be confiscated for land reform purposes. Confiscation for the purpose of protecting public health and safety is discussed briefly below, followed by a determination of whether confiscation can be regarded as a suitable approach for the acquisition of agricultural land for redistribution.

4 2 Confiscation for the purpose of protecting public health and safety

Various pieces of legislation make provision for confiscation orders.[516] Laws that authorise confiscation of property usually have a legitimate regulatory purpose,[517] such as combatting crime or preventing public harm.[518] In this regard, confiscation orders may amount to criminal or civil forfeiture. Interestingly, “confiscation” and “forfeiture” (criminal or civil) are often used interchangeably. For example, in terms of the Prevention of Organised Crime Act 121 of 1998, which provides for criminal and civil forfeiture,[519] “confiscation”[520] is used to describe forfeiture.

Civil (*in rem*) forfeiture is distinguished from criminal (*in personam*) forfeiture by three considerations: Firstly, a criminal forfeiture requires prior criminal conviction of the property

[513] Pienaar (2018) *JQR* 1.
[514] See 3 2 3 4 above.
[515] Van der Walt *Constitutional Property Law* 312.
[516] See for example, the Criminal Procedure Act 51 of 1977; the Films and Publications Act 65 of 1886; the Drugs and Trafficking Act 140 of 1992; the Prevention of Organised Crime Act 121 of 1998; and the Proceeds of Crime Act 76 of 1996.
[517] Van der Walt *Constitutional Property Law* 312.
[518] 314, 329.
[519] Section 18 and part 3 of the Prevention of Organised Crime Act 121 of 1998.
[520] Section 12(1) read with section 18(1) of the Prevention of Organised Crime Act 121 of 1998.

owner,[521] whereas civil forfeiture only requires the State to allege that the property probably constitutes illegal contraband or that it was probably used for an illegal purpose. Secondly, the onus of proof in civil forfeiture cases is preponderance of probabilities and not the criminal requirement of proof beyond reasonable doubt. Thirdly, criminal forfeiture only covers property held by the criminal at the time of conviction, whereas civil forfeiture relate back to the date of illegal use of the property regardless of whether it is still owned or possessed by the criminal. In this regard, civil forfeiture orders ordinarily relate to property used as "instrumentalities of crime", where the owner of the property was not involved with the criminal activity.[522] This means that civil forfeiture could involve property belonging to innocent third parties who had no knowledge of, and who were not involved in, the criminal activity.[523]

Despite this distinction, confiscation orders (both criminal and civil forfeiture)[524] of property should be treated as deprivations of property that have to adhere to the requirements of section 25(1) of the Constitution.[525] Confiscation orders are always authorised in terms of legislation,[526] but may be defined differently, in different pieces of legislation, for different purposes.[527] However, as regulatory actions that allow for the deprivation of property, these limitations are generally easy to justify in terms of the State's police power in its core function of protecting public health and safety.[528] For example, in *Director of Public Prosecutions: Cape of Good Hope v Bathgate*[529] the High Court held that confiscation of property (criminal forfeiture) in terms of the Proceeds of Crime Act 76 of 1996 and the Prevention of Organised Crime Act 121 of 1998 amounts to a deprivation of property in terms of section 25(1).[530] However, such a deprivation would be justified in light of the State's aim to combat crime.[531]

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[521] Van der Walt *Constitutional Property Law* 320. See section 18(1) of the Prevention of Organised Crime Act 121 of 1998.
[522] Chapter 6 of the Prevention of Organised Crime Act 121 of 1998 authorises forfeiture of instrumentalities of criminal activity which may place a heavy burden on property owners. Van der Walt *Constitutional Property Law* 330.
[523] See Van der Walt *Constitutional Property Law* 311-333.
[524] 311-333.
[525] Van der Walt *Constitutional Property Law* 311-312. See also V Basdeo "The law and practice of criminal asset forfeiture in South Africa criminal procedure: A constitutional dilemma" (2014) 17 *Potchefstroom Electronic Law Journal* 1048-1069.
[526] Van der Walt *Constitutional Property Law* 311.
[527] See for example, the chapter 2 of the Criminal Procedure Act 51 of 1977; section 30 of the Films and Publications Act 65 of 1886; chapter 4 of the Drugs and Trafficking Act 140 of 1992; part 3 of the Prevention of Organised Crime Act 121 of 1998; and section 9(2) the Proceeds of Crime Act 76 of 1996 (repealed).
[528] Van der Walt *Constitutional Property Law* 312.
[529] 2000 2 SA 525 (C).
[530] *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 2 SA 525 (C) para 82.
[531] Paras 84-113.

Accordingly, while confiscation in terms of law of general application would constitute a deprivation, such deprivation would not amount to an arbitrary deprivation of property.[532]

Ordinarily, criminal forfeiture does not amount to an arbitrary deprivation of property, because the deprivation of property would be justified in light of public health and safety considerations. However, due to "the lack of criminal prosecution and conviction and [the] forfeiture of property belonging to innocent owners",[533] civil forfeiture is scrutinised more carefully by courts. For example, owners are provided with an innocent owner's defence,[534] based on a proportionality test to ensure that the civil forfeiture is fair and does not amount to an arbitrary deprivation.[535]

The effect of confiscation orders is that the property is forfeited to the State, because it "was either proved or suspected to have been involved in a crime".[536] The State becomes the owner of the property. Therefore, both confiscation and expropriation allow for the acquisition of property by the State. However, confiscation should be distinguished from expropriation. Van der Walt explains that:

> "…forfeiture is clearly not intended as a 'normal' expropriation for which the affected owner is compensated, and its primary purpose is regulatory in the sense that it is employed to regulate the use of property for a public purpose (namely to fight crime). However, its effects may appear expropriatory in that property owners who are not involved in or even aware of the crime lose their property to the state, which acquires the property in a very real sense and often benefits from it financially".[537]

Expropriation can be done with or without the consent of the owner and normally requires compensation to be paid to the owner,[538] whereas confiscation implies no consent of the owner and does not require the State to pay compensation to the property owner. Furthermore, the procedure for a valid expropriation or a confiscation differs in terms of the authorising legislation.[539] The context, aim and justification of an expropriation and

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[532] Van der Walt *Constitutional Property Law* 314-319.
[533] 329.
[534] Section 52 of the Prevention of Organised Crime Act 121 of 1998. See also *National Director of Public Prosecutions v Van der Merwe* 2011 2 SACR 188 (WCC) para 42.
[535] Van der Walt *Constitutional Property Law* 329-333. See also *National Director of Public Prosecutions v Van der Merwe* 2011 2 SACR 188 (WCC) para 42.
[536] Van der Walt *Constitutional Property Law* 315-316.
[537] 320.
[538] Sections 25(2) and (3) of the Constitution of the Republic of South Africa, 1996.
[539] Compare the procedure for forfeiture set out in the Prevention of Organised Crime Act 121 of 1998, with the procedure set out in the Expropriation Act 63 of 1975. See also the procedure for a valid expropriation set out in the Draft Expropriation Bill B-2019.

confiscation also differ. In terms of an expropriation, property is acquired by the State for a public purpose or in the public interest, to serve the public as a whole. Ordinarily there is no element of criminal activity where expropriation is employed, whereas the confiscation of property is linked to criminal activity and is employed to regulate the use of property for a public purpose, such as combatting crime or preventing public harm.

The following section aims to determine whether confiscation can be used to acquire agricultural land for land reform purposes.

4 3 Confiscation for the purpose of land reform

One radical mechanism available for the acquisition of agricultural land is outright confiscation.[540] Property (movable or immovable) is confiscated by the State, without payment of compensation,[541] if it is regarded as being in the public or State's interest to do so.[542] In this regard, "confiscation" and "nationalisation" are also often used interchangeably. However, confiscation refers to an approach or method used to acquire land, and the nationalisation of a particular asset (such as all agricultural land) refers to the possible end result which may be achieved by means of confiscation.[543] Nationalisation thus amounts to government control and management of land, where land is transferred to and owned by the State and private ownership of land is eliminated.[544] Furthermore, expropriation with or

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[540] Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21; S Pazcakavambwa & V Hungwe "Land redistribution in Zimbabwe" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 137-167.

[541] Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution* 137; Van der Walt & Pienaar *Introduction to the Law of Property* 129-130; Ntsebeza "Land redistribution in South Africa: The property clause revisited" in *The Land Question in South Africa* 107, 122; L Cliffe "Land reform in South Africa" (2000) 27 *Review of African Political Economy* < http://www.tandfonline.com/doi/pdf/10.1080/03056240008704459?needAccess=true> 273 277-278 (accessed 29-05-2017).

[542] See Van der Walt & Pienaar *Introduction to the Law of Property* 129-130 where the authors distinguish between forfeiture and confiscation and Van der Walt *Constitutional Property Law* 311-314; Ntsebeza "Land redistribution in South Africa: The property clause revisited" in *The Land Question in South Africa* 107 122; Cliffe (2000) *Review of African Political Economy* 277-278.

[543] C Modisane "Why SA needs nationalisation" (24-06-2012) *News24* <http://www.news24.com/MyNews24/Why-SA-needs-nationalisation-20120624> (accessed 29-05-2017); S Greenberg "Land Nationalisation" (05-07-2011) *The South African Civil Society Information Service* <http://sacsis.org.za/site/article/702.1> (accessed 28-05-2017); P Coetzer "Nationalisation of land: Land ownership battles intensifies" (19-07-2012) *Leadership* <http://www.leadershiponline.co.za/articles/nationalisation-of-land-1687.html> (accessed 28-05-2017).

[544] However, see O Duru "Nationalisation, Expropriation or Confiscation: A critical overview of the pro and contra arguments regarding the effect of the Land Use Act on land in Nigeria" (06-10-2012) *SSRN* <https://ssrn.com/abstract=2157273> or <http://dx.doi.org/10.2139/ssrn.2157273> (accessed 29-05-2017) 3-8 where the author distinguishes further between nationalisation and partial nationalisation: "Nationalisation" would mean to bring land under the management and control of the government. It is the taking away of private land for public use. The legal effect of nationalisation would be to completely take over land with a view to continued exploitation by the State, instead of exploitation by private individuals, families or communities. Nationalisation of land amounts to termination of all pre-existing private rights and interests leaving no room for the creation of future ones. It suggests State ownership, with no individual interest in land whatsoever.

without compensation may also be used to achieve the nationalisation of certain assets. While the end result (nationalisation) may be the same regardless of whether expropriation or confiscation is used, expropriation and confiscation differ in a number of ways, [545] including the procedure which has to be followed in terms of the authorising legislation.[546]

There may be some benefits to acquiring land by way of confiscation, including for example, no or little direct costs of acquiring land.[547] However, employing confiscation as a mechanism for acquiring agricultural land for redistributive purposes may also have other undesirable consequences, such as "reduced investor confidence and an international backlash".[548] Arguably, these consequences can also have a negative knock-on effect as the economy as a whole may be impacted detrimentally, devaluating currency, which in turn could place additional burdens for the costs of land reform on the South African fiscus and citizens.[549] At an international level, confiscation of land was historically also linked to revolutionary political change, usually characterised by violence,[550] which is not reconcilable with the constitutional aims and values embodied in the South African Constitution or the very particular characteristics of the South African land reform programme.[551] Increasingly, populist cries support confiscation of land,[552] endorsed by various political figures and

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Accordingly, where pre-existing private rights and interests still exist in land and future ones can still be created, the author uses the term "partial-nationalisation".

[545] See 4 1 above where the distinction between an expropriation and confiscation is set out.

[546] Compare the procedure for forfeiture set out in the Prevention of Organised Crime Act 121 of 1998, with the procedure set out in the Expropriation Act 63 of 1975. See also the procedure for a valid expropriation set out in the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.

[547] Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21.

[548] Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21. See also Van den Brink *et al* "Agricultural land redistribution in South Africa: Towards accelerated implementation" in *The Land Question in South Africa* 183.

[549] Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21. See also Van den Brink *et al* "Agricultural land redistribution in South Africa: Towards accelerated implementation" in *The Land Question in South Africa* 183.

[550] Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution* 137; Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21.

[551] JM Pienaar "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1)" (2014) *Tydskrif vir die Suid-Afrikaanse Reg* 425-446, 432. See also Pienaar *Land Reform* 823.

[552] While there have been no cases where land has been confiscated without compensation, there has been much talk of it in the news. However, see 3 3 above which discusses recent developments pertaining to the notion of expropriation without compensation. See also L Dentlinger "Nkwinti: Government must start expropriating land without compensation" *Eyewitness News (EWN)* <http://ewn.co.za/2017/02/14/expropriating-land-must-begin-to-speed-up-socio-economic-reform (accessed 23-05-2017); S Graham "Jacob Zuma calls for confiscation of white land without expropriation" >(03-03-2017) *The Telegraph* <http://www.telegraph.co.uk/news/2017/03/03/jacob-zuma-calls-confiscation-white-land-without-compensation/> (accessed 23-05-2017); A Makinana "Land Reform: Zuma moves for expropriation with no compensation" *The City Press* (31-03-2017) <http://city-press.news24.com/News/land-reform-zuma-moves-for-expropriation-with-no-compensation-20170331> (accessed 23-03-2017); P Herman "Parliament votes 261 to 33 against expropriation without compensation" (01-03-2017) *Huffpost* <http://www.huffingtonpost.co.za/2017/02/28/parliament-votes-261-to-33-against-land-grabs/> (accessed 23-05-2017); C Smith "What prevents expropriation without compensation in SA?" (11-04-2017) *Fin24*

spokespersons.[553] However, the Constitution of South Africa specifically protects existing property rights[554] and does not allow for the confiscation of land from current owners for purposes of land reform.[555] The current formulation of the Constitution[556] provides for the expropriation of property for purposes of land reform.[557] As explained,[558] the "creative tension"[559] that exists between the protection of existing rights on the one hand, and the transformative thrust embodied in the section 25(4)-(9) on the other, necessitates innovative and critical mechanisms.

Arguably, section 25(8) of the Constitution, which provides that no provision of section 25 may impede the State from taking legislative and other measures to achieve land reform, may in theory support the use of confiscation to acquire land for redistribution. However, confiscation needs to be effected in terms of authorising legislation.[560] Currently, there is no legislative framework (law of general application) for the confiscation of property for land reform purposes. Accordingly, if the State wishes to acquire land by way of confiscation for redistribution purposes, then legislation is required setting out the parameters for the confiscation including: (a) how confiscation is to be defined; (b) from whom the land will be confiscated and how such private party will be identified; (c) under which circumstances will

<http://www.fin24.com/Economy/what-prevents-expropriation-without-compensation-in-sa-20170411> (accessed 23-05-2017); C Paton "ANC must lobby society on expropriation of land, says Dlamini-Zuma" (06-04-2017) *BusinessDay* <https://www.businesslive.co.za/bd/national/2017-04-06-anc-must-lobby-society-on-expropriation-of-land-says-dlamini-zuma/> (accessed 23-05-2017).

[553] Jacob Zuma, the President of the Republic of South Africa; Julius Malema, leader of the Economic Freedom Fighters; Gugile Nkwinti, the Minister of Rural Development and Land Reform; Nkosazana Dlamini-Zuma, former African Union Commission chairwoman; Ayanda Dlodlo, Deputy Minister for Public Service and Administration; Malusi Gigaba, the Finance Minister and his adviser, Professor Chris Malikane *inter alia.* See Dentlinger "Nkwinti: Government must start expropriating land without compensation" *Eyewitness News (EWN)* <http://ewn.co.za/2017/02/14/expropriating-land-must-begin-to-speed-up-socio-economic-reform (accessed 23-05-2017); Graham "Jacob Zuma calls for confiscation of white land without expropriation" >(03-03-2017) *The Telegraph* <http://www.telegraph.co.uk/news/2017/03/03/jacob-zuma-calls-confiscation-white-land-without-compensation/> (accessed 23-05-2017); Makinana "Land Reform: Zuma moves for expropriation with no compensation" *The City Press* (31-03-2017) <http://city-press.news24.com/News/land-reform-zuma-moves-for-expropriation-with-no-compensation-20170331> (accessed 23-03-2017); Herman "Parliament votes 261 to 33 against expropriation without compensation" (01-03-2017) *Huffpost* <http://www.huffingtonpost.co.za/2017/02/28/parliament-votes-261-to-33-against-land-grabs/> (accessed 23-05-2017); Paton "ANC must lobby society on expropriation of land, says Dlamini-Zuma" (06-04-2017) *BusinessDay* <https://www.businesslive.co.za/bd/national/2017-04-06-anc-must-lobby-society-on-expropriation-of-land-says-dlamini-zuma/> (accessed 23-05-2017) in this regard.

[554] Section 25(1)-(3) of the Constitution of the Republic of South Africa, 1996; Van der Walt & Pienaar *Introduction to the Law of Property* 129-130.

[555] Sections 25(2) and (3) of the Constitution of the Republic of South Africa, 1996; Ntsebeza "Land redistribution in South Africa: The property clause revisited" in *The Land Question in South Africa* 122.

[556] See 3 2 3 2 below.

[557] Section 25(2) read with section 25(4) of the Constitution of the Republic of South Africa, 1996.

[558] See Chapter 1, 2 1.

[559] See Chapter 1, 2 1 above.

[560] Van der Walt *Constitutional Property Law* 312.

confiscation take place; and (d) whether such confiscation will be automatic or discretionary if certain circumstances are present.

Furthermore, if a law is promulgated that allows for the confiscation of property for land reform purposes, then the law can still be tested against the requirements of section 25(1) of the Constitution. The confiscation of property for land reform purposes may not constitute an arbitrary deprivation of property in terms of the *FNB*-methodology.

5 Conclusion

The Chapter set out to discuss the different approaches to acquiring agricultural land for redistribution purposes, including market-led approaches, expropriation and confiscation. It is trite that the acquisition of agricultural land, at scale and fit for agricultural production, is critical for redistribution and equity. However, much controversy exists with regard to *which* approach(es) should be employed or which approach(es) would be most suitable for land acquisition in the context of land reform in South Africa specifically.[561] In this context, the mechanisms available for the regulation of agricultural land in South Africa discussed in Chapter 3 and the different approaches to acquiring agricultural land for redistribution purposes must contribute to the overall successful implementation of the redistribution programme as a whole.

Accordingly, the following Chapter aims to provide for preliminary conclusions regarding (a) measuring the efficacy of the redistribution programme in general; (b) whether the regulatory mechanisms contribute to the overall efficacy of the redistribution programme; (c) which approach(es) can be regarded as most suitable for acquiring agricultural land for redistribution purposes; and (d) the actual redistribution of the agricultural land to beneficiaries.

[561] Binswanger-Mkhize *et al* “Introduction and summary” in *Agricultural Land Redistribution* 21.

Chapter 6: Preliminary conclusions

1 Introduction

> "Land redistribution has proceeded at a slow and uneven pace over the past 22 [25] years, with fluctuations both in budgets and the scale of land being acquired and redistributed".[1]

There is little consensus on what constitutes successful and effective land reform generally and more specifically, redistribution.[2] It is unclear against what standard, effectiveness and subsequently, the success of the redistribution programme should be measured and over what period of time it should be assessed. In this regard, the determination of the efficacy of the redistribution programme in general is complex.

One way of measuring the success is through the determination of a national target and realising the particular target. However, this raises ancillary questions, such as: Who determines the target and how is the target determined and rationalised? Arguably, there is criticism against using a target to measure effectiveness of the redistribution programme in general. In addition to the establishment of a target, the effectiveness of the redistribution programme can also be measured against a set of criteria. While criteria such as the rate of implementation; suitable compensation; and support for beneficiaries are identified as some of the criteria which could be used to determine effectiveness, it is submitted that additional criteria may have to be developed further. Accordingly, the first part of this Chapter

[1] T Kepe & R Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 22-09-2019) 4, 30. Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000>(accessed 30-07-2019) 12 which provides that: "The state has delivered 8.4 million hectares (ha) of land in terms of government's land reform programme between 1994 and March 2018…It is estimated that the progress amounts to 10% of all commercial farmland, over 23 years, compared to the initial target of 30% by 2014". See also *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the court noted the State's continual failure to comply with constitutional impertatives. In particular, the State failed to convert the tenous land rights of a Black farmer, who was initially offered to purchase the land and become owner thereof in 2003 under the LRAD. See further *Mwelase v Director-General for the Department of Rural Development and Land Reform* (CCT 232/18) [2019] ZACC 30 (20 August 2019) where the Constitutional Court confirmed and ordered the appointment of a Special Master to ensure that labour tenancy claims are processed more effectively.

[2] C Walker "Grounding 'effective land reform' for 2030: Past, present and future considerations" (2012) Paper presented on the Strategies to Overcome Poverty and Inequality, Towards Carnegie III, September 03-07 2012, University of Cape Town.

discusses targets and criteria for determining the success of the redistribution programme in general.

The Chapter then aims to determine whether the regulatory mechanisms, as set out in Chapter 3 above, are effective to the extent that they promote or contribute towards the redistribution process as a whole or the redistribution target. It is also notable that the effectiveness of the regulatory mechanism itself is linked to the successful implementation thereof, which in turn, is again dependent on the efficacy of government departments and corresponding functionaries, as well as governmental management structures and systems. It is thus acknowledged that it may also be necessary to develop a management framework or system that will ensure the effectiveness of the implementation of the regulatory mechanisms. The enquiry into such a management framework or system is however not explored in depth, due to the particular focus of this dissertation.

Furthermore, the Chapter aims to determine which approach to acquiring agricultural land for redistribution purposes may be regarded as most suitable. Suitability encompasses a number of factors or criteria, including (a) the constitutionality; (b) the efficacy; and (c) the affordability of the approach.[3]

2 Efficacy of redistribution programme in general

2 1 Introduction

One aspect of the success of a redistribution programme is measuring the efficacy thereof. However, measuring the efficacy of the redistribution programme is a difficult and complex task. In this regard, it may be necessary to (a) impose targets; or (b) develop criteria to determine whether a measure is or has been effective. Each of these methods of measuring effectiveness is discussed below.

2 2 Targets

A redistribution programme may be effective if an aim or target is set and that aim or target is realised. Critically, there is a difference between the various aims or goals of the overall redistribution programme and the particular targets of the programme.[4]

[3] See 4 below.
[4] Pienaar *Land Reform* 346.

The *White Paper on Land Policy*[5] "formulated the main [and initial] goal of the redistribution programme as providing the poor with land for residential and productive purposes in order to improve their livelihoods".[6] However, there was a gradual shift in the aim of the redistribution programme. Where the focus was initially on the poorest of the poor, a gradual shift occurred in favour of more resourced and more competent beneficiaries i.e. emerging black commercial farmers.[7] Nevertheless, the overarching aim of the redistribution programme remained broadening access to land. Accordingly, aims may change over time. In this regard, policy and regulatory mechanisms aimed at broadening access to land may also need to be adjusted in line with the changed aims.

While the broad aims include broadening access to agricultural land, the South African government set a specific target of redistributing 30% of privately owned agricultural land[8] in white ownership to beneficiaries in the redistribution programme.[9] The initial date for the realisation of this target was 1999.[10] In 1994, the *Reconstruction and Development Programme* target was to transfer 30% of white commercial agricultural land held in private ownership to poor black South Africans within the first five years of the programme.[11] However, by 1999, "less than one per cent of commercial farmland had been made available to black South Africans".[12] Accordingly, the initial date was extended to 2014.[13] After 25

[5] Department of Land Affairs, *White Paper on South Africa Land Policy* (April 1997).
[6] Pienaar *Land Reform* 274; Department of Land Affairs, *White Paper on South Africa Land Policy* (April 1997) 60.
[7] Pienaar *Land Reform* 275; R van den Brink, G Thomas & H Binswanger "Agricultural redistribution in South Africa: towards accelerated implementation" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 152-201, 154.
[8] C Walker & A Dubb "Fact Check 1: The Distribution of Land in South Africa: An Overview" *PLAAS* <http://www.plaas.org.za/plaas-publication/FC01> (accessed 28-05-2017) provides that 30% of privately owned agricultural land amounts to 24.6 million hectares. See also Pienaar *Land Reform* 346-347.
[9] The initial date for the realisation of the target was in 1999, which was subsequently extended to 2014. However, this target was also not reached. See Pienaar *Land Reform* 346; C Walker "Redistribution land reform: For what and for whom?" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 132-151.
[10] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13.
[11] Reconstruction and Development Programme (1994) <https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf> (accessed 15-08-2019); Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13.
[12] Report of the High Level Panel on the Assessment of key legislation and the acceleration of fundamental change (November 2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf> (accessed 06-06-2018) 207-208.
[13] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13.

years of democracy, this target has not been realised and it is unclear whether the target has been abandoned.[14]

Various points of critique emerge when analysing the 30% target. Firstly, it is unclear where the 30% target originates from[15] or whether it will be adjusted periodically, if at all, once the target is realised. There is also speculation that the target has been abandoned.[16] Secondly, despite various attempts[17] there is still no accurate data on (a) how much land is State-owned and privately-owned in South Africa; and (b) how much agricultural land has been transferred, which makes it impossible to determine whether the 30% has actually been realised. It is thus crucial to establish first how much of the land is agricultural land and then to establish who owns the land, before it can be redistributed. Furthermore, it is impossible to report precisely on the progress of the redistribution programme where data is incomplete. Importantly, post-1994 title deeds do not reflect the race of the title holder.[18]

Both national land audits conducted in 2017, one by the agricultural lobby group AgriSA[19] and the other by government[20] are based on the analysis of information derived from title deeds in the national registry. It is problematic that the State land audit does not deal with agricultural land specifically. Instead, the audit reflects South Africa's entire surface area. This makes it incomparable to the land audit of AgriSA. For example, the AgriSA land audit

[14] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13 provide that: "…this target was set for 1999, then deferred to 2014, then to 2025, then apparently abandoned, and was in any case based on estimates of affordability rather than any inherent social, economic or political logic".
[15] Pienaar *Land Reform* 301, 346.
[16] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13.
[17] Thus far two land audits in 2013 and in 2017 were conducted by the Department of Rural Development and Land Reform. See Department of Rural Development and Land Reform, *Land Audit on State-Owned Land* (February 2013) <http://www.ruraldevelopment.gov.za/phocadownload/Cadastral-Survey-management/Booklet/land%20audit%20booklet.pdf> (accessed 15-08-2019); Department of Rural Development and Land Reform, *Land Audit Report, Phase II: Private land ownership by raced, gender and nationality* (November 2017) <file:///C:/Users/tinakotze/Downloads/land_audit_report13feb2018.pdf> (accessed 15-08-2019). The 2013 Land Audit revealed, among its findings, that most of this state land was unsurveyed and unregistered trust land which is occupied by individuals and communities in the former homelands. The department has embarked on a process to survey, register and vest that trust land to individual and community owners through the Communal Land Tenure Bill. The purpose of the 2017 Land Audit is to provide information on private land ownership by race, nationality, and gender as of 2015. Furthermore, another land audit was also conducted by AgriSA and the Land Centre of Excellence. See AgriSA, Land Centre of Excellence *Land Audit: A transactions approach* (November 2017).
[18] Pienaar *Land Reform* 347.
[19] AgriSA, Land Centre of Excellence *Land Audit: A transactions approach* (November 2017).
[20] Department of Rural Development and Land Reform, *Land Audit Report, Phase II: Private land ownership by raced, gender and nationality* (November 2017).

deals with 93.5 million hectares of South African land used for farming,[21] whereas the State land audit deals with all 111 million hectares of what is categorised as rural and semi-rural land, registered as farms.[22] Furthermore, it may be that a certain percentage of land has been transferred to the beneficiaries of the redistribution programme, but there is no record of whether it was effected in terms of private transactions or *via* land reform programmes.[23] Cousins also points out that:

> "The AgriSA land audit of 2017 argues that the initial target of transferring 30% of agricultural land via land reform is close to being met. It concludes that the market is much more effective at transferring land than the state. But the market is not redistributing land to black people to the extent AgriSA claims. Its methodology and most of its conclusions are fundamentally flawed. For example, much of the 4.3 million hectares of land it says were acquired through private purchases by previously disadvantaged individuals includes transfers of land as a result of land reform. In these cases, government has provided funds and served as an intermediary in the transaction."[24]

Accordingly, these transactions cannot be regarded as private transactions.[25]

The State's land audit is also not particularly useful. While it provides for some evidence of continuing patterns of racial inequality in land ownership in urban and rural areas generally,[26] it cannot identify the race, gender or nationality of some 320 000 companies, trusts and community based organisations that seemingly own 69% of all privately owned land.[27]

Thirdly, if the land is purchased by the State, but ownership is not transferred to the intended beneficiaries or land is leased to the beneficiaries without the option to purchase the land,[28]

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[21] AgriSA, Land Centre of Excellence *Land Audit: A transactions approach* (November 2017) 10.
[22] Department of Rural Development and Land Reform, *Land Audit Report, Phase II: Private land ownership by raced, gender and nationality* (November 2017) 5.
[23] B Cousins "Land debate clouded by misrepresentation and lack of data" *The Conversation* (10-03-2018) <http://theconversation.com/south-africas-land-debate-is-clouded-by-misrepresentation-and-lack-of-data-93078> (accessed 9-04-2018).
[24] Cousins "Land debate clouded by misrepresentation and lack of data" *The Conversation* (10-03-2018). See also AgriSA, Land Centre of Excellence *Land Audit: A transactions approach* (November 2017) 13, 28.
[25] Cousins "Land debate clouded by misrepresentation and lack of data" *The Conversation* (10-03-2018).
[26] Department of Rural Development and Land Reform, *Land Audit Report, Phase II: Private land ownership by raced, gender and nationality* (November 2017) 2. The Land Audit reveals that Whites own 26 663 144 ha or 72% of the total 37 031 283 ha farms and agricultural holdings by individual landowners; followed by Coloured at 5 371 383 ha or 15%, Indians at 2 031 790 ha or 5%, Africans at 1 314 873 ha or 4%, other at 1 271 562 ha or 3%, and co-owners at 425 537 ha or 1%.
[27] Department of Rural Development and Land Reform, *Land Audit Report, Phase II: Private land ownership by raced, gender and nationality* (November 2017) and Cousins "Land debate clouded by misrepresentation and lack of data" *The Conversation* (10-03-2018).
[28] Pienaar *Land Reform* 346. See Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013). See also *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the State failed to convert the tenuous land rights

then the 30% will not be realised as ownership remains vested in the State.[29] In this regard the Advisory Panel on Agriculture and Land Reform explains that:

> "Since 2011, the state has stopped giving people land purchase grants or subsidies with which to buy land. Instead, government buys land and retains ownership, while allocating leases. In terms of the State Land Lease and Disposal Policy of 2013, these are meant to be 30-year leases, for which lessees are meant to pay 5% of net annual turnover as rent…Beneficiaries are typically afforded conditional use rights and in many cases do not have recorded rights – which means that even in cases where the State has bought land, it has failed to redistribute land rights".[30]

While these mechanisms may broaden access to land in general, the land ownership patterns will not be altered.

Fourthly, the 30% target is also criticised as being inadequate if it serves as an indicator of success when achieved, for sustainable economic development and the reduction of rural poverty.[31] If the racial profile of farmers is reshaped, it could be argued that land reform has been effective and successful.[32] However, while targets may be a good starting point, the success of the redistribution programme cannot only be measured against the amount of land transferred. It should also be measured against the performance of the agricultural land in terms of production and what it implies for beneficiaries, *inter alia,* in terms of jobs, livelihood and wealth. In this regard, the effectiveness of the redistribution programme should rather be measured against particular criteria and not only on whether the targets had been met.[33]

Fifthly, the importance and absolute focus on achieving the 30% target may take away from the implementation of more effective mechanisms.[34] For example, transfer of land may be regarded as an effective mechanism because it directly reflects a change in ownership patterns and therefore contributes to the 30% target being achieved. However, "share equity

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of a Black farmer, who was initially offered to purchase the land and become owner thereof in 2003 under the LRAD programme.

[29] Walker "Redistribution land reform: For what and for whom?" in *The Land Question in South Africa* 132-151.

[30] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 12. See also Chapter 5, 2 4 2 above where the *State Land Lease and Disposal Policy* is discussed.

[31] Pienaar *Land Reform* 274, 346. See also White Paper on Land Reform (1997) 60; Walker "Redistribution land reform: For what and for whom?" in *The Land Question in South Africa* 142.

[32] Pienaar *Land Reform* 346.

[33] See 2 2 below.

[34] Pienaar *Land Reform* 347.

schemes can play an important role as redistributive tools".[35] These schemes ensure that wealth and income are redistributed, while agricultural production is maintained and even improved. However, the use of a share equity scheme does not contribute to the overall target being realised, nor does it redress the land ownership patterns. Accordingly, the overemphasis on achieving targets may overlook viable share equity schemes.[36]

Lastly, reaching the national 30% target does not necessarily mean that regional and local targets have been met.[37] Kepe and Hall note that there have been substantial differences in land redistribution across provinces in relation to how much land has been acquired and transferred to beneficiaries.[38] In this regard, it is suggested that national land targets need to be disaggregated to provincial and district level, to be more responsive to local conditions, opportunities and constraints.[39] There are substantial differences in land redistribution across provinces: in how much land has been acquired; how much of the budget spent; and the number of people benefitting.[40] Walker suggests further that:

> "While the national target of 30% may be kept as a crude measure of progress towards a de-racialised commercial farming sector, care needs to be taken that it does not become the primary measure of success, nor come to operate as a ceiling on state land acquisition."[41]

Instead of the 30% target becoming the primary indication of success, it is suggested that the effective and successful implementation of the redistribution programme be measured in terms of particular criteria levelled against main and sub-objectives of the redistribution programme.

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[35] Pienaar *Land Reform* 347. See Chapter 5, 2 5 1 for a discussion of the 50/50 policy, which proposes the use of share equity schemes.
[36] Pienaar *Land Reform* 347. See SL Knight & MC Lyne "Perceptions of farmworker equity-schemes in South Africa" (2002) 41 *Agrekon* 356-374; S Knight, M Lyne & M Roth "Best institutional arrangements for farm-worker equity-share schemes in South Africa" (2003) 42 *Agrekon* 228-251.
[37] 347.
[38] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 4.
[39] Pienaar *Land Reform* 347; Walker "Grounding 'effective land reform' for 2030: past, present and future considerations" (2012) Discussion paper 13.
[40] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 4.
[41] Walker "Grounding 'effective land reform' for 2030: Past, present and future considerations" (2012) Discussion paper 13-14.

2 3 Criteria

While there is little consensus on what effective redistribution means substantively, criteria can arguably be developed to measure effectiveness.

Given the temporal nature of land reform in general;[42] the complexities and interplay between different regulatory mechanisms; budget restraints[43] and competency issues on the part of the State,[44] it is suggested that redistribution will be effective if the aim of the regulatory mechanism is reached within a reasonable time. Therefore, the first criterion to measure the effectiveness of the redistribution programme is the period of *time* it takes to reach the aim(s) of the regulatory mechanism in question. However, there is no precise or definite definition of what constitutes a reasonable time in South African law.[45] Arguably, it is best to determine what constitutes a reasonable time in light of the particular land reform context. The reasonableness of the period of the redistribution process may be assessed in light of (a) the complexity of the regulatory measure giving effect to the redistribution programme; (b) the conduct in the form of transactions between the State and private agricultural land owners; and (c) the conduct of the relevant State department and officials.[46] Accordingly, while the meaning of a reasonable time may be vague and lead to uncertainty, the time period affixed to the implementation of a redistribution programme should be flexible.[47] This means that, even though redistribution of land may take decades, that in itself is no indication that it will not ultimately be effective.

While the pace of land reform has been slow,[48] it does not necessarily mean that redistribution has failed. It means that the redistribution programme must be adjusted and

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[42] Pienaar *Land Reform* chapter 4 in general.
[43] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 13.
[44] See *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the State failed to convert the tenuous land rights of a Black farmer, who was initially offered to purchase the land and become owner thereof in 2003 under the LRAD programme. Repeat of previous fn(s), see fn 28 above.
[45] T Kotzé *Effective relief regarding residential property following a failure to execute an eviction order* LLM, Stellenbosch University (2016) 13.
[46] Kotzé *Effective relief regarding residential property following a failure to execute an eviction order* 13-14.
[47] 14.
[48] J Gerber "Parliament concerned about slow pace of land reform" (20-05-2017) *News24* <https://www.news24.com/SouthAfrica/News/parliament-concerned-about-slow-pace-of-land-reform-20170519> (accessed on 09-04-2018); R Delano "Land Reform: This Land is ours" (06-10-2014) *BBQ* < http://www.bbqonline.co.za/articles/land-reform-12592.html> (accessed on 09-04-2018); C Bisseker "How government is throttling land reform" (24-08-2017) *Financial Mail* <https://www.businesslive.co.za/fm/features/2017-08-24-how-the-government-is-throttling-land-reform/> (accessed on 09-04-2018). Contra: J Myburgh "The myth of 'slow pace' of land redistribution II" (01-11-2013) *politcsweb* <http://www.politicsweb.co.za/news-and-analysis/the-myth-of-the-slow-pace-of-land-

focused on finding better and more efficient ways of acquiring land at a reasonable cost. This leads to a discussion of the second criterion – payment of suitable compensation, including below-market compensation.[49] The main constraints to payment of low compensation are high land prices [50] and budget constraints.[51] The decision to pay market price means that the available budget determines, and therefore constrains how much land can be acquired. What is required in this regard is a move away from the payment of often inflated market-related prices towards the payment of just and equitable compensation as envisaged by the Constitution in section 25(3).[52] Accordingly, the payment of low(er) compensation will ensure that more land can be acquired with limited governmental funds, which in turn may contribute to the effective implementation of the redistribution programme.[53]

As mentioned above, targets may be a good starting point, but the success of the redistribution programme cannot be measured against the amount of land transferred only. Therefore, as a third criterion, the effectiveness of the redistribution programme should also be measured against the performance of the agricultural land in terms of production and what it implies for beneficiaries in terms of jobs, livelihood and wealth.[54] Once the land has been transferred to the beneficiaries, there seems to be a lack of post-settlement or post-transfer support,[55] for example in establishing the beneficiaries as viable commercial

redistribution-i> (accessed on 09-04-2018); Kirsten *Reflections on 25 years of engagement with the land question in South Africa* Inaugural lecture delivered on 21 November 2017, Stellenbosch University 9.

[49] WJ du Plessis *Compensation for expropriation under the Constitution* LLD, Stellenbosch University (2009) iii, 4.

[50] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 41-45.

[51] 76-80.

[52] Du Plessis *Compensation for expropriation under the Constitution* iii, 4; E (WJ) du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 369-387. See also Chapter 5, 3 2 3 2 above.

[53] Although the determination of compensation, in land reform cases is an important consideration which may contribute to the effective implementation of the redistribution programme, it is an issue which requires greater attention and further research. Accordingly, it is not within the scope and focus of this study to explore the determination of compensation where agricultural land is acquired for redistribution purposes in depth. See in this regard, Du Plessis *Compensation for expropriation under the Constitution* (2009) iii, 4; E du Plessis "Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform" (2014) 17 *Potchefstroom Electronic Law Journal* 798-830, 808; Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 369-387.

[54] TJ Manenzhe *Post-settlement support challenges for land reform beneficiaries: Three case studies from Limpopo Province* M.Phil Thesis, University of the Western Cape (2007).

[55] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 73-75.

farmers, which also contributes to the poor performance of the redistribution programme.[56] In this regard, investment in education, skills development and mentorship[57] are all required to ensure the sustainable and productive use of agricultural land for purposes of food security and economic development.[58]

While government "appears to acknowledge how crucial post-settlement support is to the success of land reform,[59] increase in food security, sustainable land-based economic development and increasing the prosperity of poor people who were previously, and sometimes continue to be, marginalized",[60] there are still many challenges.[61] Kepe and Hall provide that:

> "A combination of factors, including limited staff capacity, weak staff management, and expanding mandates for which the DRDLR is not currently equipped, hamper the provision of settlement and production support to beneficiaries".[62]

Furthermore, many of the challenges originated at earlier stages of the redistribution process, *before* the implementation of post-settlement support becomes relevant.[63] These challenges are numerous and relate to various issues, including:

> "…poor beneficiary selection in redistribution projects, staff capacity to deal with the bureaucracy involved in helping beneficiaries apply for the support they need, over-reliance on consultants to do some of the work, thus leaving many projects without continuity of support, and so forth".[64]

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[56] Kirsten *Reflections on 25 years of engagement with the land question in South Africa* Inaugural lecture delivered on 21 November 2017, Stellenbosch University 13.
[57] JA van Niekerk, IB Groenewald & EM Zwane "Mentorship by commercial farmers in the land reform programme in the Free State Province" (2014) 42 *South African Journal of Agricultural Extension* 62-70.
[58] HP Binswanger-Mkhize "From failure to success in South African land reform" (2014) 9 *African Journal of Agricultural and Resource Economics* 253-269.
[59] Department of Land Affairs, *The White Paper on South African Land Policy* (1997) 9; NS Masoka, *Post-settlement land reform challenges: The case of the Department of Agriculture, Rural Development and Land Administration, Mpumalanga Province* Master of Public administration Thesis, North-West University (2014). See also Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 13.
[60] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 75; Department of Land Affairs, *The White Paper on South African Land Policy* (1997) 9; Masoka *Post-settlement land reform challenges: The case of the Department of Agriculture, Rural Development and Land Administration, Mpumalanga Province* (2014) in general.
[61] Department of Land Affairs, *The White Paper on South African Land Policy* (1997) 9.
[62] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 5.
[63] 75.
[64] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of*

Furthermore, Kepe and Hall also highlight that:

> "[n]o national monitoring and evaluation system is available to determine the extent to which farms (agricultural land) acquired by the state for redistribution have (a) been allocated to beneficiaries (b) been confirmed through the allocation of long term leases or (c) being beneficially used to improve the livelihoods of the recipients."[65]

Accordingly, in light of the discussion above, it may be proposed that successful and effective redistribution of agricultural land requires specific attention to three criteria: (a) implementation of the regulatory measures within a reasonable time; (b) payment of suitable compensation; and (c) extended support for the beneficiaries to ensure the necessary agricultural production for food security purposes.[66] If these criteria are met, then the redistribution of agricultural may be regarded as effective.

3 Efficacy of the regulatory mechanisms for redistribution purposes

3 1 Introduction

While the regulatory measures may be constitutional,[67] it still needs to be determined whether they are effective or whether they contribute toward the successful and effective implementation of the redistribution programme in general. In this regard it is questioned whether the regulatory measures discussed in Chapter 3 above are effective to realise the aim and mandate in section 25(5) of the Constitution, namely to broaden access to (agricultural) land.

3 2 Restrictions on subdivision of agricultural land

The restrictions on subdivision in terms of SALA and the Preservation Bill are regarded as a major impediment to land reform, and to changing farming systems through land reform.[68]

South Africa 75. See also HP Binswanger-Mkhize "From failure to success in South African land reform" (2014) 9 *African Journal of Agricultural and Resource Economics* 253-269.

[65] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 5, 75. See also Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 13.

[66] Kirsten *Reflections on 25 years of engagement with the land question in South Africa* Inaugural lecture delivered on 21 November 2017, Stellenbosch University 13 where the author states that the success of the land reform effort is constrained by poor agricultural support systems.

[67] See Chapter 4 above.

[68] Van den Brink *et al* "Agricultural redistribution in South Africa: Towards accelerated implementation" in *The Land Question in South Africa* 152-201. Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 26.

Hall identifies two situations where subdivision is needed for land reform purposes.[69] Firstly, Hall highlights that it is:

> "…needed to divide portions of existing farms for redistribution, so as to offer a variety of land parcel sizes. This is also essential if underutilised land is to be targeted. In conjunction with a land tax, which raises the costs to landowners of retaining ownership of large tracts of unutilised or underutilised land, subdivision can assist in making land available in smaller parcels suited to the needs of potential beneficiaries".[70]

Secondly, it is needed "where large properties are acquired for redistribution and then divided into smaller portions for allocation to beneficiaries".[71]

Kirsten and Van Zyl point out that the longevity of SALA may have less to do with the law than with a mistaken belief that part-time or small-scale farming is inefficient.[72] In this regard it is often suggested that the repeal of SALA[73] would be a practical and cost-free way of making vast quantities of land rapidly available in principle. As discussed in Chapter 2 above,[74] the argument whether subdivision of agricultural land is regarded as a constraint to land reform and redistribution purposes, turns on the debate whether small or large-scale farms are more productive. Accordingly, depending on whether one argues that small or large-scale farming is more viable or productive, it can be argued that subdivision may or may not speed up the redistribution process and therefore may or may not contribute towards the effective and successful implementation thereof.[75]

The promotion of subdivision of agricultural land must also be weighed up against other concerns such as protecting and preserving agricultural land and agricultural uses in light of food security concerns for the benefit of present and future generations. [76] As mentioned in

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[69] R Hall (ed) *Another countryside? Policy options for Land and Agrarian Reform in South Africa* (2009) 49.
[70] Hall (ed) *Another countryside? Policy options for Land and Agrarian Reform in South Africa* 49.
[71] 49.
[72] JF Kirsten & J van Zyl "Defining small-scale farmers in the South African context" (1998) 37 *Agrekon* 560-571 in general. See further Kirsten *Reflections on 25 years of engagement with the land question in South Africa* Inaugural lecture delivered on 21 November 2017, Stellenbosch University.
[73] Interestingly, although a repeal act, the Subdivision of Agricultural Land Repeal Act 64 of 1998, was drafted, it was not put into operation. The continued operation of SALA has, amongst other, been attributed to the absence of universal zoning regulations, which would have prevented the irreversible loss of good quality farm land to non-agricultural uses. In principle, this argument should fall away as the Spatial Planning and Land Use Management Act of 2013 requires every municipality to adopt zoning regulations.
[74] See Chapter 2, 3 2 4 above.
[75] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 46-49.
[76] Preamble of the Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016.

Chapter 1,[77] in the process of redistribution, agricultural productivity, development and food security may not be compromised.[78] Arguably, as set out in the Preservation Bill, land identified as "high quality agricultural land" should not be available for redistribution purposes, unless the potential beneficiaries under the redistribution programme have the necessary skills and capital to ensure that the quality of land remains the same.

Furthermore, as already discussed above,[79] where the redistribution of agricultural land flows directly from the operation of the Act 126, the general restrictions on subdivision of agricultural land do not pose a constraint to land reform and the redistribution process.

3 3 Agricultural land ceilings

The Regulation Bill is a regulatory measure that is intended to contribute to the effective and successful realisation of the 30% target, alluded to above. The establishment of the Land Commission[80] and the provisions dealing with disclosures of (a) present ownership, specifically those provisions requiring all agricultural land owners to disclose their race, gender and nationality[81] and (b) acquisition of ownership[82] are particularly helpful to provide accurate data on who owns the land and how much land is theoretically available for the redistribution of agricultural land. Once the registry is established and constantly updated it will, in principle, be easier to determine whether the 30% target will be achieved and whether it is necessary to adjust the target upwards or downwards.

As set out in Chapter 3,[83] the imposition of land ceilings will provide for ceiling-surplus land ("redistribution agricultural land") which may be acquired by the State for redistribution purposes. In this way, the imposition of land ceilings in terms of the Regulation Bill may speed up the redistribution process by making more land available for citizens, and thereby broadening access to land and contributing to the realisation of the redistribution target. In terms of the Regulation Bill, ceiling-surplus land, defined as "redistribution agricultural land" must first be offered to Black South African citizens.[84] In this way, if a Black South African citizen exercises the right of first refusal in respect of the "redistribution agricultural land",

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[77] See Chapter 1, 1 above.
[78] Section 25(1) of the Constitution of the Republic of South Africa, 1996; Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 5.
[79] See Chapter 2, 3 2 3 - 3 2 4 above.
[80] Clause 4 of the Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.
[81] Clause 15(2)(a) of the Regulation of Agricultural Land Holdings Bill.
[82] Clause 16 of the Regulation of Agricultural Land Holdings Bill.
[83] See Chapter 3, 3 3 above.
[84] Clause 26(2) of the Regulation of Agricultural Land Holdings Bill.

ownership will be transferred to him or her, and thereby not only broadening access to land, but also contributing to the redistribution target and adjusting land ownership patterns.

3 4 Restrictions on foreign ownership of agricultural land

The restrictions pertaining to foreign ownership, namely (a) placing restrictions on a foreign owner's right to dispose of his or her property [85] and (b) restricting foreigners from acquiring ownership of agricultural land in future[86] also make more agricultural land available for citizens in principle.

In terms of the former restrictions, agricultural land is either redistributed to the beneficiaries from the Minister once it is acquired or it is directly redistributed to citizens on the open market. However, other concerns arise when dealing with land redistributed directly to citizens on the open market. While this avenue broadens access to land to citizens in principle, it is unclear if the land will be transferred to beneficiaries of the redistribution programme or to *any* citizen. If the land is transferred to any South African citizen, the constitutional mandate to broaden access to land to citizens is technically met, as there is no policy or law stipulating precisely what this constitutional right entails or who it is aimed at. In other words, where the citizen who acquires the agricultural land in question on the open market, is not a beneficiary of the redistribution programme, namely a Black citizen at the very least, the restrictions on foreigners disposing of their agricultural land will not contribute towards the redistribution target.

The latter restriction, namely the prohibition on foreigners acquiring ownership of agricultural land in future, in principle promotes the aim of section 25(5) of the Constitution as the acquisition of agricultural land in future will be the prerogative of citizens only. However, such a development may impact negatively on foreign investor confidence and direct investment in South Africa, which in turn may impact the economy, food production and security in South Africa. Arguably, there may be less restrictive means to regulate foreign ownership of agricultural land as explored further in Chapters 7 and 9.

[85] See Chapter 3, 3 4 2 above.
[86] See Chapter 3, 3 4 3 above.

4 The suitability of the approaches in acquiring agricultural land for redistribution purposes

4 1 Introduction

Having provided an exposition of the different approaches to acquiring agricultural land for redistribution purposes in Chapter 5, a pertinent question that remains to be answered is which approach is most suitable for acquiring agricultural land.[87] In this regard, suitability encompasses a number of factors or criteria including, (a) the constitutionality; (b) the efficacy; and (c) the affordability of the approach.

The constitutionality is linked to the parameters provided for in the Constitution, already dealt with in detail in Chapter 4 above.[88] As mentioned,[89] the requirements for an expropriation are that it should take place in terms of a law of general application, in the public interest or for a public purpose, against payment of just and equitable compensation. It should be noted that the requirements for a valid expropriation may change in future. In light of recent developments,[90] the Constitution may be amended to provide for expropriation without compensation. Such a change may thus also impact the affordability of the approach where agricultural land is concerned. The constitutionality of the approach acts as a threshold requirement for the particular approach to be considered suitable. Accordingly, if the approach to acquiring agricultural land for redistribution is not constitutional, considerations of efficacy and affordability do not arise.

The efficacy of the approach may be linked to the length and intricacy of the process followed under each approach. The complexity of phases required to acquire the land and the number of role players involved, such as the government officials and different State departments, land owners and beneficiaries may impact the efficacy of the approach.

The affordability of the approach is associated with the costs to acquire the agricultural land in question. This includes costs, such as the payment of compensation, if any compensation is justifiable at all. Except for the guidelines provided for in the 2018 regulations and the overarching application of the PVA, there is no integrated approach for the calculation of

[87] Pienaar *Land Reform* 226, 360; Binswanger-Mkhize *et al* “Introduction and summary” in *Agricultural Land Redistribution* 21.
[88] See Chapter 4, 2 above.
[89] See Chapter 5, 3 2 above.
[90] See Chapter 5, 3 3 2 above.

compensation in land reform cases.[91] As explained, the exact role of the OVG is as yet unclear.[92] The principles set out in the Constitution for calculating the amount of compensation may also be altered in future if the Constitution is amended to provide for expropriation without compensation. Other considerations would include the impact the acquisition will have on farm workers and tenants who rely on the land for their livelihood. Other costs, such as the cost of relocation or resettlement may also play a role in determining whether the acquisition approach is affordable and ultimately suitable.

Pienaar aptly suggests that in the pursuit of achieving effective land reform, "a more nuanced or dualistic approach [should be adopted] where the success of the [land reform] programme is not locked into one single [acquisition] mechanism or approach".[93] Each of the approaches will be considered to determine which is the most suitable for acquiring agricultural land for redistribution. However, arguably a combination of approaches may be used to acquire agricultural land for redistribution.

4 2 Market-led approaches

Market-led approaches, founded on the WBWS principle, are not constitutionally embedded. Instead the use thereof is a policy choice. With regard to the efficacy of the approach, depending on whether a demand-led or supply-led approach is followed, there may be multiple parties involved in identifying agricultural land for acquisition, negotiating or determining the price for the land in question and redistributing the land to the beneficiaries. Thus, it is difficult to pinpoint exactly how many phases or how long each phase may take, given that there is no legislative framework which provides for the procedure which has to followed. Furthermore, even if this approach is constitutional and efficient, it may not be affordable.

With regard to the affordability of this approach, the cost of acquiring land may be too high if this approach is followed. As explained,[94] acquiring property at market value or at an inflated price makes the cost of acquiring agricultural land too high,[95] which in turn would

[91] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13.
[92] See Chapter 5, 3 2 3 5 above.
[93] Pienaar *Land Reform* 361.
[94] See Chapter 5, 3 3 5 1 above.
[95] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 41-45.

make the acquisition of land unsustainable. The main problem with market-led approaches is that it is too costly for the government to sustain, given the budget allocated for land reform[96] and the other demands on the fiscus.[97] Accordingly, while market-led approaches are constitutional, they may be regarded as unaffordable and therefore unsuitable for the acquisition and redistribution of agricultural land. However, while it is clear that there must be a move away from *only* using market-led approaches or the WBWS model, it may still have a role to play where the State is not a party to the acquisition transaction. Accordingly, where a land owner on his or her own accord decides to sell agricultural land to a beneficiary, market-led approaches may still be relevant. One way to reduce the costs associated with market-led approaches is for the government to rely on its expropriation powers embedded in the Constitution.

4 3 Expropriation

Currently, as explained above,[98] the Constitution allows for the expropriation of property for a public purpose or in the public interest, against the payment of just and equitable compensation. Despite the fact that the government's expropriation powers are embedded in the Constitution, the State has failed to utilise its powers readily. However, the constitutionality of this approach is not enough for this approach to be regarded as the most suitable. The approach also needs to be effective, affordable and the outcome of the redistribution process must be clear.

The efficacy of expropriation as an approach to acquiring agricultural land for redistribution, relates to whether the procedure for a valid expropriation set out in the expropriation legislation[99] can be completed within a reasonable time. In this regard, different government officials and departments may be involved in the expropriation process, including the DALRRD; the Department and Minister of Public Works; the OVG; the land owners and where relevant, the courts, all need to function effectively in finalising the expropriation process within a reasonable time.

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[96] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 41-45.
[97] Such as education, access to housing, access to health care etc.
[98] See Chapter 5, 3 above.
[99] The Expropriation Act 63 of 1975 and the Draft Expropriation Bill B-2019 in GG No 42127 of 21-12-2018.

With regard to affordability of the approach, namely the costs associated with acquiring agricultural land by way expropriation, retired Justice Sachs notes that:

> "[The Constitution] contains no willing seller, willing buyer principle [for the calculation of compensation], the application of which could make expropriation unaffordable".[100]

As mentioned above, despite legislation and the OVG, there is no integrated approach for the calculation of compensation in land reform cases.[101] In this regard, a distinction needs to be drawn between expropriation for land reform and non-land reform purposes. The approach may be more affordable if a value lower than market value is payable for expropriation in the public interest (for land reform), if it is just and equitable to do so in the circumstances. There may even be cases where no compensation for the expropriation is justified, as explained.

Although the regulations under the PVA provide for a method of quantifying and applying the section 25(3) factors in relation to one another, it is still unclear when the OVG enters into the picture in assisting the court and/or the State in determining compensation for an expropriation for land reform purposes.[102] As mentioned above,[103] the determination of the value of the property could be used by the court, and by the State, as a *guideline* for determining just and equitable compensation where property is acquired for land reform purposes.[104] Further clarification is needed regarding the exact scope of the Act; when the

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[100] The quotation is set out in the Report of the High Level Panel on the Assessment of key legislation and the acceleration of fundamental change (November 2017) 206 as part of retired Justice Sach's submission to Parliament.

[101] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13.

[102] See *Moloto Community v Minister of Rural Development and Land Reform*, unreported, case no LCC 204/2010, 4 February 2019, Land Claims Court, Randburg <http://www.justice.gov.za/lcc/jdgm/2019/2019-lcc-204-2010.pdf> (accessed 11-09-2019) and *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019). The question arises whether the Property Valuation Act 17 of 2014 and the determination of value by the Valuer-General ousts the jurisdiction of the court to determine just and equitable compensation. From these two judgments it is clear that clarity regarding the impact of the Property Valuation Act remain unaddressed. Further clarification, specifically in jurisprudence is needed regarding the exact scope of the Act; when the Act must be used and at what stage of the expropriation process; and what the relationship, duties and responsibilities of courts *vis-á-vis* the Office of the Valuer-General and Property Valuation Act are.

[103] See Chapter 5, 3 2 3 2 above.

[104] There is no provision preventing the Minister from paying compensation that exceeds the value of the property as determined by the Office of the Valuer-General. See *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019) para 35.

Act must be used and at what stage of the expropriation process; and what the relationship, duties and responsibilities of courts *vis-á-vis* the OVG and PVA are.

Intervention to clarify the position may be in the form of (a) a policy on redistribution, which supports an interpretation that compensation below market value should be paid in cases of expropriation for land reform;[105] and/or (b) coordinated utilisation of regulations under the PVA; and/or (c) an amendment to the Expropriation Bill or the provision of a compensation policy which expands on the categories of land which *may* be acquired for nil compensation[106] and which sets out the factors and circumstances under which nil compensation may be payable. In this regard, alignment between the Expropriation Bill and the PVA is required.

In summation, the simplest solution to make expropriation as an approach more affordable would arguably be to acquire land for land reform purposes with government funds at a value which is just and equitable, namely lower than market value.[107] Furthermore, the boundaries of just and equitable compensation ought to be scrutinised and tested.[108]

Once the State has acquired the land through expropriation, it must still redistribute the land to the beneficiaries. Depending on the aim of the redistribution programme which needs to be set out clearly in policy, there are various options available. For example, if the aim is to change ownership patterns, the transfer ownership to the beneficiaries is necessary. However, if the aim of the redistribution programme is to broaden access to land and provide security of tenure, the State can lease the land to the beneficiaries, with or without the option to purchase the land, while making post-settlement support readily available. Apart from the rights awarded to beneficiaries, other questions pertaining to *who* the beneficiaries should be and *how* they should be selected should also be addressed in policy.

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[105] In the absence of an amended property clause.
[106] Clause 12(3) of the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.
[107] Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in *Rethinking Expropriation Law I: Public Interest in Expropriation* 386-387. See for example the following cases *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 (19 April 2012); *Msiza v Director-General, Deparment of Rural Development and Land Reform* 2016 5 SA 513 (LCC).
[108] See also JM Pienaar "Onteiening sonder vergoeding: Voorvereiste vir suksesvolle grondhervorming of populisme?" (18 January 2018) <http://www.lintnet.co.za/onteiening-sonder-vereiste-vir-suksesvolle-grondhervorming-populisme> (accessed 30-05-2018) 1-9.

4 4 Confiscation

Confiscation of agricultural land is not constitutionally permissible[109] and is therefore not a suitable option for acquiring land for redistribution. Unless the State amends the Constitution, particularly the property clause,[110] or promulgates legislation which makes provision for confiscation of agricultural land for redistribution purposes (which may still amount to an arbitrary deprivation of property in terms of section 25(1) of the Constitution) such an approach is not an option. In fact, it is highly questionable whether confiscation would ever be acceptable as a general tool in a democratic society based on human dignity, equality and freedom. As mentioned above,[111] the nature of confiscation is punitive and contrary to the overall constitutional imperative of healing the divisions of the past and establishing a free and equal society.[112]

4 5 Reflection

It is trite that the acquisition of agricultural land, at scale and fit for agricultural production, is critical at an overarching level for redistribution and equity. Different approaches are available for the acquisition of agricultural land for land reform purposes. These approaches include market-led approaches, expropriation and confiscation. However, much controversy exists with regard to *which* approach or approaches should be employed or would be most suitable for land acquisition in the South African context of land reform.[113] This was the main focus of this Chapter.

Market-led approaches, founded on the WBWS principle, can either be demand-led or supply-led. Although market-led approaches were constitutionally sound, it was found to be an unaffordable and unsustainable approach, because of the cost of acquiring agricultural land.

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[109] Du Plessis (2014) *PELJ* 820.
[110] However, see Chapter 5, 3 3 2 above where the current proposed amendment is set out. As it is currently formulated, the amendment does not allow for the outwright confiscation (or expropriation without compensation) of agricultural land. It only allows for the expropriation without compensation in very limited circumstances as set out in Clause 12(3) of the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.
[111] See Chapter 5, 4 3 above.
[112] Pienaar *Land Reform* 804; BV Slade, JM Pienaar, ZT Boggenpoel & T Kotzé "Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996" (15 June 2018) <https://www.sun.ac.za/english/PublishingImages/Lists/dualnews/My%20Items%20View/Submission%20to%20Constitutional%20Review%20Committee%20_%20Slade%20Pienaar%20Boggenpoel%20Kotze%20003.pdf> (accessed 15-08-2019).
[113] Binswanger-Mkhize *et al* "Introduction and summary" in *Agricultural Land Redistribution* 21.

Expropriation for land reform purposes is provided for in the Constitution. In principle, this approach may be affordable if just and equitable compensation (which may be lower than market value or in some cases may be very low) is provided for. The affordability of this approach directly correlates to the sustainability thereof. If the land can be acquired and redistributed at a constant rate or level, because of the affordability thereof, then the land reform programme is sustainable in the long run. Accordingly, expropriation can be regarded as an affordable and sustainable approach for acquiring land.

While confiscation may be affordable it may, in light of the current formulation of the Constitution be regarded as unconstitutional and therefore not a suitable approach for the acquisition of agricultural land. Furthermore, it is also not sustainable because it may result in violent and polarised responses, which is contrary to the reconciliatory aim of the Constitution.

Having regard to all the approaches, it is postulated that both market-led approaches and expropriation may be suitable for acquiring agricultural land for redistribution. To redistribute as much agricultural land as possible, a combination of approaches, should be employed.[114]

5 The redistribution of agricultural land

Once agricultural land is acquired by way of market-led approaches or by way of expropriation, the land needs to be redistributed. In this regard, at an overarching level, it is clear that there is no coherent framework, policy or law that provides for the redistribution of agricultural land in South Africa. The lack of a clear national redistribution policy also contributes to the difficulty in measuring the effectiveness or the success of the redistribution programme as a whole. Accordingly, it is proposed that the following aspects be addressed in policy:

Firstly, content should be given to section 25(5) of the Constitution. In other words, from the outset, the outcome of the redistribution programme should be clear and set out in a national policy. Secondly, the manner in which agricultural land is identified for acquisition and redistribution should also be provided for in policy. Thirdly, the policy should provide for the identification and selection of beneficiaries. Qualifying criteria, selection criteria and the selection process should be provided for in this regard. It is also important to differentiate

[114] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 79.

between the different land needs and demands of beneficiaries. Depending on the different land needs and demands, the quantity and quality of agricultural land redistributed should be determined accordingly. In this regard, a fourth aspect that needs to be addressed in policy is the amount of agricultural land to be redistributed to each beneficiary. Lastly, the type of land rights the beneficiaries will receive should also be stipulated in policy. This last aspect also relates to the determination of the concept of redistribution in South Africa. For example, if the aim of the redistribution programme is to diversify ownership patterns, then it will not be sufficient or effective to provide beneficiaries only with limited real rights or equity shares in relation to the land. Accordingly, it is submitted that a comparative perspective may provide insights on addressing these aspects and formulating a national redistribution policy or law.

6 Conclusion

The difficulty in measuring the effectiveness or the success of the redistribution programme as a whole stems from the lack of (a) a coherent framework, policy or law that gives content to section 25(5) of the Constitution; (b) accurate data regarding (i) the question of who owns what land in South Africa and (ii) how land is identified for redistribution purposes; and (c) relevant questions pertaining to the redistribution process, specifically: (i) *who* the beneficiaries ought to be; (ii) *how* they ought to be selected; (iii) *what quantity* of agricultural land they ought to receive and; (iv) *what type of rights* the beneficiaries of the redistribution programme ought to receive. Accordingly, it is proposed that a legal framework for redistribution, namely a National Redistribution Policy or Redistribution Bill should be developed to address these aspects.

This Chapter has highlighted that the success of the redistribution programme may be measured against national targets or criteria. This in turn, raises ancillary questions, including: Who determines the target or criteria? How is the target or criteria determined and rationalised? Within what time should the target or criteria be realised? Furthermore, in relation to the determination of criteria, it is submitted that better and even more suitable criteria would have to be further developed and provided for in policy.

With regard to the effectiveness of each regulatory mechanism, it was established that the restrictions on subdivision may impede the realisation of the aim and the target of the redistribution in general and should therefore be reconsidered or repealed, despite the fact that subdivision restrictions are constitutional. Accordingly, the restrictions on subdivision of

land are ineffective with respect to the realisation of land reform objectives, specifically redistribution. However, with respect to the regulatory mechanisms in the Regulation Bill, it was found that these contribute towards the aim and objectives of the redistribution programme. In this regard, the mechanisms may be regarded as effective, although not in isolation. Therefore, the implementation of the regulatory mechanism is directly linked to the efficacy of relevant government departments and corresponding management structures and systems. This inevitably means that a suitable management framework or system would have to be developed to ensure or contribute to the effectiveness of the regulatory mechanisms.

In relation to the most suitable approach, it is suggested that the State combine both market-led approaches and expropriation as means of acquiring agricultural land for redistribution purposes. However, further aspects, such as the manner in which agricultural land is identified for redistribution purposes and the issue of compensation should be explored further.

Finally, the Chapter highlighted that the following questions pertaining to the redistribution of the agricultural land arise: Who are the beneficiaries under the redistribution programme? What are the qualifying criteria to be regarded as a beneficiary? What are the selection criteria and what process is followed to identify suitable beneficiaries? How many beneficiaries will benefit from the land being redistributed? How much land will each beneficiary obtain? What type of rights will the beneficiary obtain in relation to the land? It should be clear whether the South African government is trying to transfer ownership of land or whether other types of rights may be awarded to beneficiaries. These questions are considered in more detail from the Namibian and Indian perspective in Chapters 7 and 8 respectively.

Chapter 7: Namibia

1 Introduction

At independence in 1990, Namibia had "one of the most unequal distributions of agricultural land in the world".[1] Despite independence, ownership of agricultural land remains unfairly distributed in Namibia.[2] The unequal distribution of agricultural land in Namibia and the need for redistribution thereof result from the former German colonial rule[3] and South African apartheid land control systems.[4] The colonial apartheid rules[5] created a "parallel agricultural

[1] E Hongslo & TA Benjaminsen "Turning Landscapes into 'Nothing': A Narrative on Land Reform in Namibia" (2002) 29 *Forum for Development Studies* 321-347, 321; SK Amoo & SL Harring "Post-independence land reform jurisprudence in Namibia and its relevance for social development" (2018) 10 *Namibian Law Journal* 3-40, 5.

[2] Amoo & Harring (2018) *Namibian Law Journal* 3; L Lenggenhager & RV Nghitevelekma "Namibia land reform policy is not working" (12 October 2018) <https://www.pressreader.com/> (accessed 29-01-2019); H Melber "No land in sight" (9 June 2017) <https://www.dandc.eu/en/article/despite-independence-1990-land-ownership-remains-unfairly-distributed-namibia> (accessed 29-01-2019); World Bank "Overview: Namibia" (19 April 2018) <http://www.worldbank.org/en/country/namibia/overview#1> (accessed 29-01-2019).

[3] JM Pienaar "Willing-seller-willing-buyer and expropriations as land reform tools: What can South Africa learn from the Namibian experience?" (2018) 10 *Namibian Law Journal* 41-64, 41; SK Amoo *Property Law in Namibia* (2014) 13-16; Amoo & Harring (2018) *Namibian Law Journal* 4. Namibia was first colonised by the Germans and remained a German colony from 1884 to 1915. Thereafter, following the aftermath of World War I, South Africa was granted a mandate over the territory. See AN Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* LLM thesis, Stellenbosch University (2012) 140-161.

[4] Amoo & Harring (2018) *Namibian Law Journal* 4. Hongslo & Benjaminsen (2002) *Forum for Development Studies* 321-347, 322 explains that: "After the First World War, German South West Africa became a League of Nations South African mandated territory and was henceforth administered basically as a South African province. Under South African rule and reinforced by the apartheid policy from 1948, the two land tenure systems - freehold for white farmers, and communal tenure under state authority for Africans - continued to develop in isolation from each other until independence". See also Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 151-161; Amoo *Property Law in Namibia* 13-16, 224-226; D Shriver "Rectifying land ownership disparities through expropriation: Why recent land reform measures in Namibia are unconstitutional and unnecessary" (2006) 15 *Transnational Law and Contemporary Problems* 419-455, 422-425; M Tong "Decolonialisation and comparative land reform with a special focus on Africa" (2014) 9 *International Journal of African Renaissance Studies* 16-35, 17-20; P Mufune "Land reform management in Namibia, South Africa and Zimbabwe: A comparative perspective" (2010) 6 *International Journal of Rural Management* 1-31, 8-19; S Kariuki "Political compromise on land reform: A study of South Africa and Namibia" (2007) 14 *South African Journal of International Affairs* 99-114, 99-103.

[5] Amoo *Property Law in Namibia* 17 where the author explains: "The legal mechanism that was used by the colonial powers in South-West Africa was legislation that was primarily geared at dividing the land on the basis of the settler-native dichotomy. This was done by the initial declaration of the territory as crown land, followed by the declaration of tribal and trust land or communal land over land originally belonging to the natives". For legislative measures creating crown and state land see the Transvaal Crown Land Disposal Ordinance of 1903, made applicable to South-West Africa by virtue of the Crown Land Disposal Proclamation 13 of 1920. See also the Reservation of State Land for Natives Ordinance 35 of 1967. For legislative measures creating reserves, trusts and communal land see the Native Administration Proclamation 11 of 1922; the Native Administration Proclamation 15 of 1928; the Native Reserve Regulation 68 of 1924; the Development Trust and Land Act 18 of 1936; the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 repealed later by section 52 of the Representative Authorities Proclamation. The author explains further that: "Ownership of land in the area demarcated as crown land vested in the colonial power, whilst part of the land was reserved for the occupation and use of the natives. Within the area of crown land the received law of the settlers applied. Customary law applied to areas reserved for the natives." See also Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 149-161.

system"[6] comprising (a) large commercial farms established for the white minority in Namibia and (b) communal or home lands for the black population.[7] Furthermore, these rules prohibited Black people from gaining or having access to commercial agricultural land.[8] Under apartheid, white people could hold land title, whereas black people held land, but their rights to the land were not legally recognised.[9] Consequently, at independence, the majority of arable and viable agricultural land was held by white land owners, while the rest of the land largely formed part of the communal areas.[10] Accordingly, a legal framework for land reform in Namibia was required.[11]

South Africa and Namibia are not only neighbouring countries.[12] For purposes of this dissertation, South Africa and Namibia are unique choices for comparative study because they share a history of colonialism and race-based minority rule under apartheid,[13] characterised by extensive land appropriation,[14] which resulted in skewed patterns of

[6] C Glintz "The High Court of Namibia: Gunther Kessl v Ministry of Lands and Resettlement and two others. Case No 27/2006 and 266/2006- A test case for the Namibian land reform programme" (2009) 42 *Law and Politics in Africa, Asia and Latin America* 263-274, 264.
[7] Amoo & Harring (2018) *Namibian Law Journal* 4-6; Amoo *Property Law in Namibia* 16-19, 208; Hongslo & Benjaminsen (2002) 29 *Forum for Development Studies* 321. See also Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 149-161.
[8] Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 264.
[9] Amoo & Harring (2018) *Namibian Law Journal* 5.
[10] J Hunter "Who should own the land? An introduction" in J Hunter (ed) *Who should own the land? Analyses and views on Land Reform and the Land Question in Namibia and Southern Africa* (2004) 1-7, 1; Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 264. Roughly at independence 52% of the agricultural farmland was in the hands of the white commercial farmer community, who made up 6% of the Namibian population. The remaining 94% of the population owned only 48% of the agricultural land.
[11] The legal framework consists out of the Constitution of the Republic of Namibia, 1990; the Agricultural (Commercial) Land Reform Act 6 of 1995; the Communal Land Reform Act 5 of 2002; and the Flexible Land Reform Act 4 of 2012. See Amoo & Harring (2018) *Namibian Law Journal* 3-4. Furthermore, Amoo *Property Law in Namibia* 16-19; 208 who notes that the distinction between commercial farms and communal lands has to a large degree been maintained by the Constitution and the corresponding legislation. The status of crown or state land is affirmed and maintained in Article 100, read with Schedule 5(1) of the the Constitution of the Republic of Namibia, 1990. Furthermore, article 16(1) of the the Constitution of the Republic of Namibia, 1990, which maintains the status of private property, affirms the fundamental right to acquire, own and dispose of property. Article 102(5) of the Constitution of the Republic of Namibia, 1990 and the promulgation of the Communal Land Reform Act 5 of 2002 indicates that the status of communal land has also been maintained.
[12] Pienaar (2018) *Namibian Law Journal* 41.
[13] Amoo & Harring (2018) *Namibian Law Journal* 4-5; Pienaar (2018) *Namibian Law Journal* 41.
[14] Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 20-21. See generally Amoo *Property Law in Namibia* 13-16, 224-226; Shriver (2006) *Transnational Law and Contemporary Problems* 422-425; Tong (2014) *International Journal of African Renaissance Studies* 17-20; Mufune (2010) 6 *International Journal of Rural Management* 8-19; S Kariuki "Political compromise on land reform: A study of South Africa and Namibia" (2007) 14 *South African Journal of International Affairs* 99-114 99-103; Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution* 137; R Hall "A comparative analysis of land reform in South Africa and Zimbabwe" in MC Lee & K Colvard (eds) *Unfinished Business: The Land Crisis in Southern Africa* (2003) 256.

ownership in both countries.[15] Both countries also experienced negotiated settlements[16] whereby new political dispensations were established in terms of which respective Constitutions provide for the protection of property rights in principle.[17] In this regard, South Africa undertook an overarching land reform programme consisting of three inter-connected pillars namely: redistribution, restitution and tenure reform, embedded in section 25 of the Constitution.[18] A variety of complex statutory land reform measures emerged to give effect to the land reform programme in general.[19]

Unlike the South Africa Constitution, the Constitution of the Republic of Namibia does not explicitly entrench its land reform programme. Instead, article 16(1), read with article 22, provides for the acknowledgement and protection of existing private property rights,[20] whereas article 16(2) allows for the expropriation of property in the public interest, subject to the payment of just compensation, in accordance with requirements and procedures to be determined by an Act of Parliament.[21] Article 16 of the Namibian Constitution consists of two sections. Article 16(1) provides that:

> "All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens".[22]

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[15] Amoo *Property Law in Namibia* 13-16, 224-226; Shriver (2006) *Transnational Law and Contemporary Problems* 422-425; Tong (2014) *International Journal of African Renaissance Studies* 17-20; Mufune (2010) *International Journal of Rural Management* 8-19; Kariuki (2007) *South African Journal of International Affairs* 99-103.

[16] Amoo & Harring (2018) *Namibian Law Journal* 9; C Mapaure "Land reform needing more reform(s): Issues in Namibian land reform process" (2018) 10 *Namibian Law Journal* 85-97, 86.

[17] Section 25 of the Constitution of the Republic of South Africa, 1996 and section 16 of the Constitution of the Republic of Namibia, 1990. See JM Pienaar *Land Reform* (2014) 815-831; Amoo *Property Law in Namibia* 224-234; Shriver (2006) *Transnational Law and Contemporary Problems* 419-455; Tong (2014) *International Journal of African Renaissance Studies* 17-20; Mufune (2010) *International Journal of Rural Management* 8-19; Kariuki (2007) *South African Journal of International Affairs* 99-103; Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land Redistribution* 137; Hall "A comparative analysis of land reform in South Africa and Zimbabwe" in *Unfinished Business: The Land Crisis in Southern Africa* 256.

[18] Sections 25(5)-25(9) of the Constitution of the Republic of South Africa; Pienaar (2018) *Namibian Law Journal* 41. See Chapter 1, 2 1 above.

[19] Pienaar *Land Reform* chapters 7-9 in general.

[20] Amoo & Harring (2018) *Namibian Law Journal* 9; AJ van der Walt *Constitutional Property Clauses* 1 ed (1999) 313.

[21] These articles are similar to the provisions dealing with the protection of private property rights in section 25(1) and the expropriation of property in section 25(2) of the South African Constitution. See Amoo *Property Law in Namibia* 4; Amoo & Harring (2018) *Namibian Law Journal* 9.

[22] Article 16(1) of the Constitution of the Republic of Namibia, 1990.

Article 16(2) furthermore provides that:

> "The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by [an] Act of Parliament".[23]

Accordingly, there is no constitutional impediment to land reform in Namibia.[24] The State may legally expropriate land for land reform purposes and redistribute the land in accordance with any land reform scheme.[25] The ways in which complex land reform issues are to be resolved are left to Parliament.[26]

Furthermore, article 100 of the Namibian Constitution also impacts property ownership.[27] It provides that the ownership of natural resources of Namibia vests in the State, if they are not otherwise lawfully owned.[28] These resources constitute communal lands, in terms of which Black people have no legally recognised right.[29] Accordingly, article 100 vests ownership of communal lands in the Namibian government.

In 1991, a year after the Constitution was adopted, a National Land Conference on Land Reform and the Land Question was held to decide on the course of the land reform programme in general.[30] Generally, the land conference resolved to compensate for the dispossession of land, and that government would focus on the inequity of land ownership in the commercial agricultural areas.[31] For example, it was resolved that abandoned and underutilised commercial agricultural land will be reallocated and used productively;[32] that land owned by absent landowners, primarily foreign national land owners, would be

[23] Article 16(2) of the Constitution of the Republic of Namibia, 1990.
[24] Article 16(2) of the Constitution of the Republic of Namibia, 1990; Amoo & Harring (2018) *Namibian Law Journal* 9.
[25] Article 16(2) of the Constitution of the Republic of Namibia, 1990; Amoo & Harring (2018) *Namibian Law Journal* 9.
[26] Amoo & Harring (2018) *Namibian Law Journal* 9.
[27] Mapaure (2018) *Namibian Law Journal* 88.
[28] Article 100 of the Constitution of the Republic of Namibia, 1990 provides that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the State if they are not otherwise lawfully owned.
[29] Amoo & Harring (2018) *Namibian Law Journal* 5; Mapaure (2018) *Namibian Law Journal* 88.
[30] Ministry of Land Reform, *The National Land Conference on Land Reform and the Land Question* (June/July 1991) 30-40 for the main topics of discussion at the conference.
[31] Ministry of Land Reform Part 1, Section 2 of the *National Land Conference on Land Reform and the Land Question* (June/July 1991) 30-35.
[32] Ministry of Land Reform, *The National Land Conference on Land Reform and the Land Question* (June/July 1991) 32. No comma, see fn 30 above

expropriated[33] and that very large farms and multiple ownership of farms would not be permitted.[34] By way of contrast, Namibia's land reform programme did not include a restitution programme.[35] Instead, the Namibian land reform programme focused on broadening access to land and resettling the landless.[36] In this regard, both the South African and Namibian governments were compelled to broaden access to land, to redistribute land and to provide resettlement.[37]

The main focus of the land reform programme in Namibia is therefore on acquiring commercially viable agricultural land for resettlement.[38] The resettlement of the landless is a voluntary process in terms of which eligible citizens purposefully decide to apply to be resettled at their preferred resettlement destination.[39] While there is no accepted definition of resettlement, it may be defined as a process of land allocation which aims to ensure the fair and equitable distribution of State acquired agricultural (commercial) land to previously disadvantaged persons and communities. This encapsulates Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land.[40]

While South Africa and Namibia are comparable given the shared historical backgrounds and consequent need for redistribution of agricultural land,[41] other factors, such as the vast difference in population numbers in South Africa and Namibia; the amount of arable agricultural land; climate and rainfall given the two jurisdictions' topography, must be kept in mind.[42]

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[33] Ministry of Land Reform, *The National Land Conference on Land Reform and the Land Question* (June/July 1991) 31-32.
[34] 32.
[35] Ministry of Land Reform, *The National Land Conference on Land Reform and the Land Question* (June/July 1991) 31; Pienaar (2018) *Namibian Law Journal* 42. See Mufune (2010) *International Journal of Rural Management* 20 where the author explains that "a restitution programme was deemed too complex as ancestral rights to land of various ethnic groups had been super-imposed on one another, making disentanglement of the various rights and rights holders extremely difficult". See also Kariuki (2007) *South African Journal of International Affairs* 107.
[36] Pienaar (2018) *Namibian Law Journal* 42; Amoo *Property Law in Namibia* 224; Kariuki (2007) *South African Journal of International Affairs* 107; Mufune (2010) *International Journal of Rural Management* 20; Hongslo & Benjaminsen (2002) *Forum for Development Studies* 321-347, 322.
[37] Pienaar (2018) *Namibian Law Journal* 42.
[38] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 16. See the Commercial (Agricultural) Land Reform Act 6 of 1995.
[39] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 16.
[40] See Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 8, 16-17.
[41] Pienaar (2018) *Namibian Law Journal* 43.
[42] 63.

The aim of this Chapter is not to provide for an in-depth analysis of the respective land reform programmes conducted in South Africa and Namibia. Instead, for purposes of the chapter, the legal position regarding (a) the concept of agricultural land in Namibia; (b) mechanisms for the regulation of agricultural land and (c) approaches and/or mechanisms for the acquisition of agricultural land in Namibia are explored. The Chapter then concludes with a reflection in respect of the three identified focae above. Later in the study, Chapter 9 will provide for a comparative analysis between South Africa, Namibia and India regarding the concept of agricultural land; the mechanisms for the regulation of agricultural land; and the approaches and/or mechanisms for the acquisition of agricultural land. This Chapter is thus essential in laying the foundational basis for an in-depth legal comparative analysis to follow.

2 The concept of agricultural land in Namibia

2 1 Introduction

Post-1920, after occupation by the South African colonial authorities in 1915,[43] land in Namibia was generally classified as State or crown land,[44] private land and communal land.[45] As mentioned, most of the commercially viable agricultural land set aside for private ownership was predominantly owned by white settlers, while the remainder was (and still is) held by the indigenous people situated in the communal areas.[46] Amoo states that this classification is the origin and cause of the skewed land ownership patterns in Namibia.[47] To a large extent, this classification has been maintained under the Namibian Constitution.[48]

[43] Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 152-153.
[44] Amoo *Property Law in Namibia* 17; Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 153-160.
[45] Amoo *Property Law in Namibia* 19-20; Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 153-160. Lands were also initially classified as native reserves, native trusts and areas for native nations.
[46] Amoo *Property Law in Namibia* 20, 209. See also Republic of Namibia, *National Conference on Land Reform and the Land Question Consensus Document* (1991); Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 153-160.
[47] Amoo *Property Law in Namibia* 208; Kamkuemah *A comparative study of black rural women's tenure security in South Africa and Namibia* 153-160.
[48] The status of crown or state land is affirmed and maintained in Article 100, read with Schedule 5(1) of the Constitution of the Republic of Namibia, 1990. Furthermore, article 16(1) of the Constitution of the Republic of Namibia, 1990, which maintains the status of private property, affirms the fundamental right to acquire, own and dispose of property. Article 102(5) of the Constitution of the Republic of Namibia, 1990 and the promulgation of the Communal Land Reform Act 5 of 2002 indicates that the status of communal land has also been maintained.

Accordingly, at an overarching level, agricultural land in Namibia can be categorised as commercial (agricultural) land owned either privately or publically by the State and communal (agricultural) land. The distinction between commercial agricultural land and communal (agricultural) land is important because two different regulatory schemes deal with the respective categories of land. For purposes of this Chapter in general and for comparative analysis specifically, this dissertation will not deal with communal agricultural land. Instead, the focus falls on the regulation and acquisition of privately owned (or free-hold) commercial agricultural land. In this regard, there may be various regulatory legislative schemes or mechanisms which define agricultural land differently, depending on the objectives of the legislative scheme. In order to determine whether a piece of land falls under the scope and regulation of a particular piece of legislation, it is therefore necessary to determine what constitutes agricultural land under the specific legislative mechanism.

The concept of agricultural land will only be explored within the regulatory scheme(s) governing agricultural land in Namibia. In this regard, four pieces of legislative measures are specifically aimed at regulating commercial agricultural land in Namibia: (a) the Subdivision of Agricultural Land Act 70 of 1970; (b) the Agricultural Land Act 5 of 1981; (c) the Agricultural (Commercial) Land Reform Act 6 of 1995; and (d) the Land Bill B19-2016.

2 2 The Subdivision of Agricultural Land Act 70 of 1970

The Subdivision of Agricultural Land Act 70 of 1970 ("SALA"), which regulates the subdivision of agricultural land in South Africa[49] was brought into force in South West Africa on 2 January 1971.[50] The administration of SALA was furthermore transferred to South West Africa on 2 March 1978.[51] This means that none of the amendments to SALA in South Africa after the date of transfer and prior to Namibian independence in 1990 is applicable to South West Africa (Namibia), unless it is made expressly applicable.[52] However, the aims of SALA in Namibia and South Africa are identical. Furthermore, the provisions defining "agricultural

[49] See Chapter 2, 2 and Chapter 3, 3 2 respectively.
[50] The Act was brought into force by way of RSA Proclamation 329 of 1970 (RSA *GG* 2950).
[51] Transfer Proclamation AG 11 of 1978, dated 2 March 1978.
[52] For example, the following amendments to SALA in South Africa are not applicable to Namibia because it was not expressly made applicable: The Subdivision of Agricultural Land Amendment Act 12 of 1979; the Subdivision of Agricultural Land Amendment Act 18 of 1981; and the Subdivision of Agricultural Land Amendment Act 33 of 1984. Other amendments to SALA in South Africa which have expressly been made applicable to Namibia, because the amendments were effected before 2 March 1978 include: the Subdivision of Agricultural Land Amendment Act 55 of 1972; the Subdivision of Agricultural Land Amendment Act 19 of 1974; and the Subdivision of Agricultural Land Amendment Act 18 of 1977.

land" in SALA and regulating the subdivision of agricultural land in Namibia and South Africa are practically indistinguishable.

The definition of agricultural land under SALA is discussed in Chapter 2 and need not be repeated here. In summation, SALA defines agricultural land a residual category of land in South Africa and Namibia. More specifically, SALA defines agricultural land as "any land",[53] and then lists categories of land that do not form part of the definition.[54] While agricultural land is defined as a category of land, it is still unclear what agricultural land is. Given the topography of Namibia, not all land defined as agricultural land for purposes of SALA will be or can be used for agricultural purposes. A strictly technical approach to the categories of land set out in SALA is thus insufficient for purposes of actual redistribution.

2 3 The Agricultural Land Act 5 of 1981 (Rehoboth)

Despite the repeal of the Rehoboth Self-Government Act 56 of 1976[55] by the Namibian Constitution,[56] the operation of the Agricultural Land Act 5 of 1981 (Rehoboth)[57] (henceforth referred to as "ALA") remains in force.[58]

Like SALA, the ALA defines agricultural land as a residual category of land. It also provides that agricultural land is any land except (a) land owned by the Government or which is held in trust for any person and communities by the Government and (b) land which the Kaptein in terms of a decision of the Kaptein's Council excludes from the provision of this Act.[59] This wide definition does not provide more clarity on what agricultural land is.

2 4 The Agricultural (Commercial) Land Reform Act 6 of 1995

The Agricultural (Commercial) Land Reform Act 6 of 1995 ("ACLRA") specifically makes provision for the acquisition of private agricultural land for resettlement. It is therefore necessary to determine what constitutes agricultural land in terms of ACLRA.

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[53] Section 1 of the Subdivision of Agricultural Land Act 70 of 1970.
[54] Section 1(a)-(f) of the Subdivision of Agricultural Land Act 70 of 1970.
[55] The aim of the Rehoboth Self-Government Act 56 of 1976 was to grant self-government in accordance with the Paternal Law of 1872 to the citizens of the "Rehoboth Gebied" within the territory of South West Africa; for that purpose to provide for the establishment of a Kaptein's Council and a Legislative Council for the said "Gebied"; to determine the powers and functions of the said councils; and to provide for matters connected therewith.
[56] Schedule 8 of the Constitution of the Republic of Namibia, 1990.
[57] The Act repeals the Subdivision of Agricultural Land Act 70 of 1970 in Rehoboth.
[58] B Bertolini "The Rehoboth Baster land dispute-Attempt by the Rehoboth Baster Community to regain their ancestral land" (2018) 10 *Namibian Law Journal* 189-215, 195.
[59] Section 1 of the Agricultural Land Act 5 of 1981 (Rehoboth).

ACLRA defines agricultural land as "any land or an undivided share in land".[60] It then lists a number of pieces of land not forming part of the definition of agricultural land:

> "(a) land situated in a local authority area as defined in section 1 of the Local Authorities Act, 1992 (Act 23 of 1992); (b) land situated in a settlement area as defined in section 1 of the Regional Councils Act, 1992 (Act 22 of 1992); (c) land of which the State is the owner or which is held in trust by the State or any Minister for any person; (d) land which the Minister by notice in the Gazette excludes from the provisions of this Act."[61]

It seems that any land owned by or situated in an area under the control of the State is excluded from the definition of agricultural land and consequently the operation of ACRLA. It also seems as if communal land, forming part of the property held in trust by the State does not fall within the scope of the definition of agricultural land under ACLRA. Arguably, the operation of the ACLRA is limited to privately owned agricultural land. Similar to SALA, ACLRA provides that certain areas constitute agricultural land. However, unlike SALA, ACLRA provides some guidance on what agricultural land is. The Act refers to "agricultural land" and to "agricultural purposes".[62] Agricultural purposes is defined widely and provides that it "includes game farming".[63] While ACLRA provides for some guidance on the concept of agricultural land, it does not provide for an overarching definition pertaining to all agricultural land in Namibia, because it only applies to private commercial agricultural land.

2 5 Recent developments: The Land Bill B19- 2016

The 2016 Land Bill[64] ("Land Bill") aims, *inter alia*,[65] to consolidate and amend ACLRA and the Communal Land Reform Act 5 of 2002[66] ("CLRA") to ensure that "all [agricultural] land in Namibia has the same status".[67] Accordingly, once promulgated, the Land Bill will replace both ACLRA and CLRA. It is therefore important to take cognisance of the possible

[60] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[61] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[62] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[63] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[64] The Land Bill B19-2016 <http://www.mlr.gov.na/documents/20541/634529/Land+Bill.pdf/b32aed67-42a1-40d5-8106-d8ba85661acf> (accessed 28-08-2019).
[65] Also see clause 3 of the Land Bill B19-2016 for a list of all the objectives of the Bill.
[66] W Werner "The 2016 Land Bill: Making law without consultation and policy review" (2017) *Democracy Report Special Briefing Report No 16* 1-18 <https://ippr.org.na/wp-content/uploads/2017/02/Briefing_Land2017.pdf> (accessed 27-09-2019) 1, 6.
[67] Minister of Land Reform (2016a). Motivation statement by the Honourable Utoni Nujoma, MP, Minister of Land Reform on the Land Bill. Ministry of Land Reform / National Assembly; Werner (2017) *Democracy Report: Special Briefing Report No 16* 1.

legislative changes relating to the concept of agricultural land; the regulation of agricultural land; and the acquisition of agricultural land throughout. Werner provides that:

> "To a large extent, the provisions in the Land Bill 2016 concerning agricultural land, or more accurately, freehold land that is targeted for acquisition and redistribution by the state, have remained unchanged."[68]

With regard to the concept of agricultural land, the Land Bill provides for a new and simplified definition of agricultural land. The Land Bill provides that "agricultural land" constitutes:

> "[A]ny land or an undivided share in land that is used for agricultural purposes".[69]

"Agricultural purposes" is formulated as follows:

> "[A]gricultural purposes," includes game farming and aquaculture". [70]

Any land that is used for agricultural purposes, regardless of where it is situated constitutes agricultural land. Agricultural land is not defined as a residual category as it is under SALA and ACLRA. Instead, the Land Bill defines agricultural land according to the purpose for which the land or a piece of land is used and thus provides for an overarching definition of agricultural land. The provision of an overarching definition on agricultural land may be useful for South Africa to consider in formulating a comprehensive legal framework for the regulation of agricultural land.

3 The regulation of agricultural land in Namibia

3 1 Introduction

Various direct mechanisms which regulate the use of, and impact agricultural land and the ownership thereof are available in Namibia, including: (a) placing restrictions on the subdivision of agricultural land and (b) placing restrictions on foreigners to acquire and dispose of agricultural land. Each of the mechanisms is accordingly discussed below.

[68] Werner (2017) *Democracy Report Special Briefing Report No 16* 10.
[69] Clause 1 of the Land Bill B19-2016.
[70] Clause 1 of the Land Bill B19-2016.

3 2 Restrictions on the subdivision of agricultural land

Subdivision is a process of fragmentation of agricultural land into small parcels or allotments owned, leased or managed by individual farmers; families; or households through the erection of physical fence boundaries.[71] Given the scarcity of arable land in Namibia, the rationale for the regulation of subdivision of agricultural land is to protect the economic viability of agricultural land.[72] The following sections set out the legislative framework and policy for subdivision of agricultural land in Namibia.

3 2 1 Legislative framework

There are three acts which regulate the subdivision of agricultural land in Namibia: (a) the SALA[73]; (b) the ALA; and (c) ACLRA. SALA is applicable to the entire Namibian territory, except for the Rehoboth Gebied. Conversely, the regulation of subdivision of agricultural land in Rehoboth is regulated specifically by ALA.[74] While SALA and ALA provide for restrictions on the subdivision of agricultural land, ACLRA provides for the subdivision of agricultural land where agricultural land is acquired for redistribution under ACLRA.

These Acts, *inter alia*, place a restriction on the subdivision of agricultural land.[75] The subdivision of agricultural land (as defined) is prohibited unless the consent of the Minister[76] or the Kaptein's Council[77] is obtained in writing.[78] Without prior consent to subdivide the land, the sale or lease of the agricultural land or portion of agricultural land will be void *ab intitio*.[79] The provisions in SALA and ALA relating to the regulation of agricultural land in general and the subdivision of agricultural land specifically are similar, if not identical, to each other and to the provisions of SALA discussed in Chapter 3 and will accordingly not be repeated here.[80]

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[71] Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018) v.
[72] *Theron v Tegethoff* 2001 NR 203 (HC) 205I-206C citing *Van der Bilj v Louw* 1974 2 SA 493 (C) 499C-499E. See also the objectives of the Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018) 4. This National Policy aims to prevent agricultural land from diminishing into uneconomical and ecologically non-sustainable land units.
[73] As amended in South Africa to 2 March 1978.
[74] The Act repeals the Subdivision of Agricultural Land Act 70 of 1970 in Rehoboth.
[75] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970 and Section 3 of the Agricultural Land Act 5 of 1981.
[76] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970.
[77] Section 3 of the Agricultural Land Act 5 of 1981.
[78] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970 and Section 3 of the Agricultural Land Act 5 of 1981.
[79] *Theron v Tegethoff* 2001 NR 203 (HC) 206E-206H referring to *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 2 SA 150 (SWA).
[80] See Chapter 3, 3 2 2 above.

While the subdivision of agricultural land by private land owners is prohibited, the Minister is allowed to subdivide land acquired for redistribution purposes under ACLRA.[81] In accordance with ACLRA, the Minister, in consultation with the Minister of Agriculture, Water and Rural Development, may:

> "(a) direct that any land acquired under this Act be subdivided into holdings for allotment to persons for purposes of small-scale farming; and (b) cause each such holding to be surveyed".[82]

The subdivision of land will be carried out in accordance with a partition plan prepared and recommended by the Land Commission.[83] Accordingly, the Minister of Lands, Resettlement and Rehabilitation, together with the Minister of Agriculture, Water and Rural Development and Land Commission may effect the subdivision of agricultural land for redistribution purposes.

3 2 2 National policy on subdivision and consolidation of agricultural land

In light of Namibia's harsh climatic conditions, smaller land units are not necessarily economically viable[84] for agricultural enterprises. Furthermore, subdivision of agricultural land may also result in land speculation for non-agricultural activities. Both situations may pose a threat to national food and nutrition security and indeed to the agricultural sector itself. Taking into account the increasing Namibian population and the growing demand for food in Namibia, the Ministry of Agriculture, Water and Forestry formulated a national policy to curb further subdivision of agricultural land that may pose a threat to food security in Namibia.

The 2018 *National Policy on Subdivision and Consolidation of Agricultural Land*[85] serves as a framework that safeguards sustainable agriculture for current and future generations in Namibia. The ultimate aim is to prevent the unrestricted and continued subdivision of agricultural land that will:

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[81] Section 38 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[82] Section 38 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[83] Section 38(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[84] "Economic viability" is defined as the "ability of an agricultural land unit area to consistently produce profitably or marginally above breakeven point within the realm of inherent natural climatic variability and sustain farming operations and afford owners a reasonable living standard without adversely affecting natural resources, land productive capacity and ecological resilience" in the Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018) v.
[85] Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018).

> "lead to the reduction in size of agricultural land into small ecologically and economically non-viable farming units. Such subdivision undermines the capacity of agricultural land users to sustainably derive decent living standards from agricultural land and contribute meaningfully to the national economy while preserving natural resources in Namibia".[86]

The ultimate goal proposed by the Policy is to ensure that agricultural land, which is not fragmented, will lead to socio-economic and ecologically sustainable land units. In light of this goal, four key policy objectives have been identified by the Ministry, namely:

> "(a) to serve as an instrument for the conservation of natural rangelands (b) to preserve and promote resilience of agricultural lands to natural climatic and manmade shocks such as recurrent and frequent droughts or overutilization by maintaining essential ecological processes and habitats (c) to prevent agricultural land from diminishing into uneconomical and ecologically non-sustainable land units [and] (d) to prevent specific high potential soils to be utilized for non-agricultural purposes".[87]

To achieve these objectives, the Policy provides for five strategies that may contribute to the prevention and elimination of uneconomical and ecologically non-sustainable land units namely: (a) setting a minimum size of agricultural land units (b) placing restrictions on the subdivision of agricultural land; (c) consolidating agricultural land units; (d) evaluating agricultural land productivity; and (e) restricting the use of high potential soils for the use of non-agricultural activities.[88]

The Policy provides for setting a minimum size of agricultural land units to serve as a catalyst for the preservation of natural rangelands and rangeland ecosystems. The policy identifies livestock production as the most appropriate land use type in Namibia. To this end, "the strategy is therefore to base minimum agricultural land unit sizes on the most critical agricultural enterprise which is extensive livestock production within the confines of the potential land carrying capacity under natural conditions".[89] Alternative agricultural land use types, such as aquaculture and horticulture may also be considered in allocating smaller agricultural land size in exceptional situations. The Policy furthermore provides that physical partitioning of agricultural land into uneconomical land units will be prohibited by an Act of

[86] Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018) 2.
[87] 4.
[88] 5-7.
[89] 5.

Parliament. Although SALA and ALA already provide for such restrictions, the Policy suggests the promulgation of a coherent amalgamated law, which will be applicable nationally. Accordingly, it proposes SALA and ALA be repealed and replaced with one piece of legislation aimed at prohibiting the subdivision of agricultural land, subject to the consent of the Minister. Furthermore, the Policy encourages the voluntary and gradual consolidation of previously subdivided and uneconomical agricultural land.

To determine whether agricultural land should be subdivided or consolidated, an evaluation of agricultural land productivity is required. In this regard, the Policy provides for the following factors to determine the productivity of agricultural land: soil quality, bush encroachment, rainfall pattern, topography, natural vegetation, size of the land, land degradation and the type of land use. In light of these parameters, different land capability classes will be determined and "regular assessments of the productive potential of agricultural land in Namibia will be undertaken and maintained in an updated database".[90] Having regard to Namibia's limited fertile soils with high potential for agricultural production, these areas need to be protected from being utilised for non-agricultural purposes. In this regard, the Policy provides that:

> "non-agricultural developments or encroachment of such developments including the incorporation into town lands, establishment of suburbs or settlements and plantation of non-food monocultures on valuable high potential fertile soils shall be discouraged".[91]

Furthermore, in cases where high potential soils fall under urban jurisdictions, "subdivision shall be allowed for the demarcation of such soils for agricultural purpose only".[92]

3 3 Restrictions on foreign ownership of agricultural land

3 3 1 Introduction

The Namibian Constitution recognises the fundamental right of all persons to acquire, own and dispose of property.[93] However, the Constitution provides for a specific proviso in relation to foreigners.[94] Parliament may by way of "legislation prohibit or regulate as it deems

[90] Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018) 6.
[91] 7.
[92] 7.
[93] Article 16(1) of the Constitution of the Republic of Namibia, 1990; *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 101. See also *Marot v Cotterell* 2014 2 NR 340 (SC) para 21.
[94] Article 16(1) of the Constitution of the Republic of Namibia, 1990; *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 101. See also *Marot v Cotterell* 2014 2 NR 340 (SC) paras 6-7, 11.

expedient the right to acquire property by persons who are not Namibian citizens",[95] namely foreigners. In effect Parliament may prohibit foreigners from acquiring agricultural land in Namibia or it may regulate and provide for specific requirements or conditions under which foreigners would be able to acquire and own or hold agricultural land.[96] However, once a non-Namibian has acquired property he or she may not be deprived of it, except by way of expropriation.[97]

3 3 2 Restrictions on foreign ownership of agricultural land in terms of ACLRA

The legislation regulating ownership of agricultural land is ACLRA. In terms of ACLRA no "foreign nationals"[98] may acquire or occupy[99] agricultural land without the prior written consent of the Minister.[100] ACLRA restricts foreign nationals from acquiring agricultural land by way of transaction and registration of transfer of ownership[101] or by way of a lease for an indefinite period or period exceeding 10 years without the prior written consent of the Minister.[102] In this regard, section 58 regulates, rather than prohibits, the acquisition of agricultural land by foreign nationals.[103] Accordingly, there is no absolute prohibition against foreigners obtaining agricultural land.[104] Instead, there is a qualified restriction, namely foreigners need to obtain written ministerial consent to acquire agricultural land in Namibia.

Despite the fact that there is no absolute prohibition against foreigners, it appears that there has been a number of occasions where parties have tried to circumvent the provisions of ACLRA. For example, in *Müller v Schweiger*[105] the parties entered into a lease for a period of 9 years and 11 months, with the option to renew the lease for a further 9 years and 11 months, without obtaining ministerial consent. The Court found that the agreement contravened section 58(1)(b) of ACLRA and was therefore illegal and void *ab initio*.[106] The finding of the High Court was confirmed on appeal in *Schweiger v Müller*.[107]

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[95] Article 16(1) of the Constitution of the Republic of Namibia, 1990.
[96] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 101. See also *Marot v Cotterell* 2014 2 NR 340 (SC) paras 6-7, 11.
[97] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 101.
[98] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[99] *Marot v Cotterell* 2012 1 NR 365 (HC) para 3.
[100] Section 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995. See *Marot v Cotterell* 2012 1 NR 365 (HC) para 3.
[101] Section 58(1)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[102] Section 58(1)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[103] *Marot v Cotterell* 2014 2 NR 340 (SC) para 11.
[104] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 HC para 102.
[105] 2005 NR 98 (HC).
[106] *Müller v Schweiger* 2005 NR 98 (HC) 106J-107B.
[107] *Schweiger v Müller* 2013 1 NR 87 (SC).

In *Marot v Cotterell*[108] a Namibian citizen (the seller) entered into a written agreement with foreign nationals (the buyers) in terms of which the foreign nationals purchased, *inter alia*, a 50% member's interest in a close corporation.[109] The corporation owned certain commercial agricultural land.[110] The agreement provided that it was in effect a sale of 50% of the immovable property, namely the commercial agricultural land.[111] Furthermore, the foreign nationals were entitled to take possession of the property on signature of the agreement.[112] In this regard, the High Court found that the right of occupation is conferred on the foreign nationals by the agreement itself.[113] The right of occupation should "not to be derived from the fact that the foreigners are members" of the close corporation.[114] Furthermore, in finding that the agreement is in contravention of section 58 of ACLRA and therefore void *ab initio*,[115] the High Court stated that the recognition of the agreement would undermine the purpose of the ACLRA.[116] On appeal,[117] the Supreme Court confirmed the rationale of the High Court. The Court similarly held that the purchase of shares in a close corporation does not give the members rights of occupation of immovable property owned by the close corporation by virtue of their membership, but rather by agreement.[118] It was also clear that the agreement between the parties conferred a right to the occupation or possession of the agricultural land upon foreign nationals for an indefinite period.[119] On this basis, the Supreme Court found the agreement in contravention of section 58(1)(b) of ACLRA and therefore void *ab initio*.[120]

In determining whether the prohibition is applicable, it must first be determined if someone falls within the definition of a "foreign national". ACLRA defines a foreign national as:

> "(a) a person who is not a Namibian citizen;
>
> (b) in relation to a company -

[108] 2012 1 NR 365 (HC).
[109] *Marot v Cotterell* 2012 1 NR 365 (HC) para 7; *Marot v Cotterell* 2014 2 NR 340 (SC) para 1.
[110] *Marot v Cotterell* 2012 1 NR 365 (HC) para 6; *Marot v Cotterell* 2014 2 NR 340 (SC) para 1.
[111] *Marot v Cotterell* 2012 1 NR 365 (HC) para 8; *Marot v Cotterell* 2014 2 NR 340 (SC) para 1.
[112] *Marot v Cotterell* 2014 2 NR 340 (SC) para 1.
[113] *Marot v Cotterell* 2012 1 NR 365 (HC) para 25.
[114] Para 25.
[115] Para 26.
[116] Para 27.
[117] *Marot v Cotterell* 2014 2 NR 340 (SC).
[118] Paras 19, 34.
[119] Para 28.
[120] Para 34.

(i) a company incorporated under the laws of any country other than Namibia; or

(ii) a company incorporated in Namibia in which the controlling interest is not held by Namibian citizens or by a company or close corporation in which the controlling interest is held by Namibian citizens; and

(c) in relation to a close corporation, a close corporation in which the controlling interest is not held by Namibian citizens."[121]

Accordingly, a foreign national may still acquire agricultural land (a) by virtue of marriage in community of property to a Namibian citizen; (b) through an interest in a company or close corporation that does not amount to a controlling interest; (c) by virtue of succession; or (d) by obtaining written consent from the Minister.[122]

If a foreign national wants to acquire agricultural land, an application must be lodged to the Minister for his or her consent,[123] which may also be conditional.[124] Furthermore, the Minister may not grant his or her consent for the acquisition of agricultural land by a foreign national unless he or she is "satisfied"[125] that (a) the acquisition of the land in question will constitute "an eligible investment as contemplated in section 5 of the Foreign Investments Act, 1990 (Act 27 of 1990)";[126] (b) the land is capable of being used or occupied in a beneficial manner for the purpose which the foreigner aims to use or occupy it[127]and (c) the use or occupation

[121] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[122] Section 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[123] Section 58(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[124] Section 58(5) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[125] Apart from the three criteria in section 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995, there are no regulations which the Minister must consult and take into account in making a decision regarding the acquisition of agricultural land by a foreign national. See OC Ruppel & K Ruppel-Schlichting (eds) *Environmental Law & Policy in Namibia: Towards making Africa the Tree of Life* 3 ed (2016) which highlight that environmental concerns are part and parcel of land use policy in Namibia.
[126] Section 58(6)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995 read with sections 5 and 7 of the Foreign Investment Act 27 of 1990. Under section 5 of the Foreign Investments Act 27 of 1990 an investment is regarded as an: "eligible investment" (1)(a) "if it is an investment, or proposed investment, in Namibia by a foreign national of foreign assets of a value of not less than the amount which the Minister may determine from time to time by notice in the *Government Gazette* for this purpose; (b) if it is a reinvestment, or proposed reinvestment, by a foreign national of the profit or proceeds of sale of an enterprise specified in a Certificate, irrespective of the amount of such reinvestment. (2) Where the investment is for the acquisition of shares in a company incorporated in Namibia, the investment shall, notwithstanding that the value thereof is equal to or exceeds the amount determined under subsection (1) (a), qualify as an eligible investment only if: (a) not less than ten per cent of the share capital of the company is held or will, following the investment, be held by the foreign national making the investment; or (b) the Minister is satisfied that the foreign national making the investment is or will be actively involved in the management of the company".
[127] Section 58(6)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.

of agricultural land will not have an adverse effect on the environment or that adequate measures will be provided for by the applicant to prevent such an adverse impact.[128]

Furthermore, ACLRA also provides that no person shall acquire or hold agricultural land as a nominee owner on behalf of or in the interest of any foreign national without the prior written consent of the Minister.[129]

In the event that agricultural land is acquired by a foreign national (or nominee owner) without the necessary consent from the Minister, the Minister may direct that the land be sold on the open market, unless he or she decides to acquire the land for purposes of resettlement.[130] A person who sells or disposes of agricultural land to a foreign national or nominee owner in contravention of the Act will also be guilty of an offence and will be liable on conviction to a fine not exceeding N$ 100 000 or imprisonment.[131]

3 3 3 Restrictions on foreign ownership of agricultural land in terms of the Land Bill

The proposed Land Bill places a twofold prohibition on the acquisition of agricultural land by foreign nationals. The Bill provides that foreign nationals may not:[132]

> "(a) acquire agricultural land through the registration and transfer of ownership in the deeds registry; or (b) acquire directly or indirectly a majority interest in a company or close corporation that owns, directly or indirectly, agricultural land."[133]

In other words, a foreign national will no longer be able to acquire ownership of agricultural land, once the Bill is promulgated. However, the Bill makes provision for a few exemptions in this regard.[134] The prohibition does not apply to the acquisition of agricultural land by a foreign national:

> "by virtue of any succession by intestacy or testamentary disposition, if such heir or legatee is ordinarily residing in Namibia; is a company in which the controlling interest is held by [a] Namibian citizen and such company is doing business in Namibia; or is a close corporation in

[128] Section 58(6)(c) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[129] Section 59 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[130] Section 60 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[131] Section 60A of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[132] Clause 114 of the Land Bill B19-2016; Werner (2017) *Democracy Report Special Briefing Report No 16* 13. See previous comments on the difference in referencing in this regard.
[133] Clause 114(1) of the Land Bill B19-2016.
[134] Clause 115 of the Land Bill B19-2016.

> which the controlling interest is held by [a] Namibian citizen and such close corporation is doing business in Namibia or who is married in community of property to a Namibian citizen and by virtue of such marriage is ordinarily residing in Namibia".[135]

Under the Land Bill foreign nationals will be restricted to acquiring a right to occupy agricultural land or a portion thereof by means of lease.[136] Such an agreement can only be entered into after written approval of the Minister is obtained.[137] Furthermore, the lease may only be:

> "for a period of 10 years at a time renewable or for a fixed period of less than 10 years, but which is renewable, and it being a condition of such agreement that the right of occupation of the land concerned may not exceed a period of 10 years in total, renewable for another maximum of 10 years at a time".[138]

The Bill does not provide for a limitation on how many times a foreign national may renew the lease where the lease is for a period of 10 years. In general, it is unclear for what period a foreign national may lease agricultural land.

Similar to the provisions of ACLRA,[139] there are also specific conditions which a foreign national must fulfil before the Minister may approve the lease.[140] The Minister must be satisfied that (a) the land is capable of being occupied beneficially for the purpose for which the foreign national proposes;[141] (b) the use or occupation of the land will not have an adverse effect on the environment or adequate measures will be taken to ensure that there is no adverse effect on the environment;[142] (c) that the holding of the land will contribute towards the economic development of Namibia through utilising Namibian resources,

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[135] Clause 115 of the Land Bill B19-2016.
[136] Clause 114(3) of the Land Bill B19-2016.
[137] Clause 114(3) of the Land Bill B19-2016.
[138] Clause 114(3) of the Land Bill B19-2016. Interestingly, "ordinarily residing" should not be equated with "permanent residency" in Namibia. In *De Wilde v Minister of Home Affairs* (SA 48/2014) [2016] NASC 12 (23 June 2016) the Supreme Court made a ruling on the term "ordinarily resident" in article 4(1) of the Constitution of the Republic of Namibia, 1990. The Court concluded that the framers of the Namibian Constitution intended the phrase "ordinarily resident" to have a meaning distinct from "permanent residence". In determining whether a person is ordinarily resident for the purposes of Namibian citizenship, each case must be considered on the facts.
[139] Section 58(6) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[140] Clause 114(6) of the Land Bill B19-2016. See also Werner (2017) *Democracy Report Special Briefing Report No 16* 13.
[141] Clause 114(6)(a) of the Land Bill B19-2016.
[142] Clause 114(6)(b) of the Land Bill B19-2016. See Ruppel & Ruppel-Schlichting (eds) *Environmental Law & Policy in Namibia: Towards making Africa the Tree of Life* which highlights that environmental concerns are part and parcel of land use policy, given the scarcity of arable agricultural land, in Namibia.

increasing employment opportunities, providing training to Namibian citizens; earning or saving foreign exchange or generating development in the less developed areas of Namibia;[143] and (d) that the holding of the land is not inconsistent with other legislative measures or policies aimed at redressing economic imbalances or the equal distribution of land in Namibia.[144]

4 The acquisition of agricultural land in Namibia

4 1 Introduction

The legislative framework dealing specifically with the acquisition and redistribution of agricultural land in Namibia is the ACLRA. The purpose of ACLRA is to provide for the acquisition of agricultural land by the State for the purposes of land reform and for the allocation of such land to Namibian citizens[145] who do not own or otherwise have the use of any or of adequate agricultural land.[146] The circumstances under which the Minister of Lands, Resettlement and Rehabilitation may acquire agricultural land are threefold: (a) where agricultural land is offered for sale to the Minister;[147] (b) where agricultural land is held by a foreign national;[148] or (c) where the Minister considers the agricultural land to be appropriate for land reform.[149] In this regard, ACLRA provides for two methods of acquiring agricultural land for redistribution and resettlement: (a) market-led approaches; and (b) expropriation.[150] Each of these methods are discussed below.

4 2 Market-led approaches for the acquisition of agricultural land

During the first 15 years after independence (1990-2005) agricultural land was almost exclusively acquired by way of market-led approaches based on the WBWS principle.[151]

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[143] Clause 114(6)(c) of the Land Bill B19-2016.
[144] Clause 114(6)(d) of the Land Bill B19-2016.
[145] For a definition of "Namibian citizen" see article 4 of the Constitution of the Republic of Namibia, 1990, read with section 1 of the Namibian Citizenship Act 14 of 1990.
[146] Preamble and section 14 of the Agricultural (Commercial) Land Reform Act 6 of 1995; Amoo *Property Law in Namibia* 82. See 3 3 2 below, for an exposition of the order of preference for beneficiaries acquiring agricultural land under the different policies and schemes.
[147] Section 14(2)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[148] Section 14(2)(b) read with sections 58 and 59 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[149] Section 14(2)(c) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[150] Amoo *Property Law in Namibia* 82-84, 90-92; *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 8.
[151] B Fuller "A Namibian path for land reform" in J Hunter (ed) *Who should own the land? Analyses and views on land reform and the land question in Namibia and Southern Africa* (2004) 83-86 83; Pienaar (2018) *Namibian Law Journal* 44.

The acquisition process is regulated by ACLRA.[152] This process is accordingly discussed below.

4 2 1 The process under ACLRA: The State's preferential right

Where a land owner (citizen or foreign national) wants to dispose of his or her agricultural land, he or she must make an offer to sell agricultural land to the State.[153] In this regard, ACLRA grants the State a preferential right in acquiring agricultural land.[154] This means that any agricultural land has to be offered to the State first, before it enters the open market.[155] Only when the State waives its interest, by issuing a certificate of waiver,[156] may the land thereafter be offered to private buyers. Accordingly, two avenues for acquiring agricultural land are created. Firstly, where the State does not issue a certificate of waiver and wishes to acquire the land and secondly, where a "certificate of waiver"[157] is issued and the land is made available on the open market to Namibian citizens only.

Where the State intends to acquire the agricultural land for redistribution, the role of the Land Reform Advisory Commission[158] (henceforth referred to as "the Commission") becomes important.[159] The Commission consists of two officers from the Ministry of Lands, Resettlement and Rehabilitation; two officers of the Ministry of Agriculture, Water and Rural Development; two persons nominated by the associations or bodies involved in agricultural affairs; one person nominated by the Agricultural Bank of Namibia and five persons (of whom at least two have to be women) who in the opinion of the Minister are suitably qualified

[152] Part 2, read with part 3 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[153] Section 17(1) of the Agricultural (Commerical) Land Reform Act 6 of 1995. In terms of section 17(4) of ACLRA the offer of sale must be in writing. Currently, the offer is made on an official offer form provided by the Ministry of Lands, Resettlement and Rehabilitation. The offer must also specify the price the owner is willing to accept; it must be accompanied by a "true copy" of the title deed and the owner must include particulars as required by the Ministry. The form provides for three main sections in this regard: (1) Section 1 requires the provision of personal details and details pertaining to the farm, such as the size and the selling price per hectare; (2) section 2 provides for the details of the land and all improvements and; (3) section 3 consists of a declaration where the willing seller declares under oath that he or she is offering the land free of any conditions.
[154] Section 17(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[155] Section 17(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[156] Section 16 read with section 17(2)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[157] Section 16(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995 defines a "certificate of waiver" as "a statement in writing made by the Minister certifying that the State waives its preferent right conferred by subsection (1) of that section and does not intend to acquire the agricultural land in question at the time of the offer.
[158] Part 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995 deals inter alia with the establishment; functions; composition; terms of office; vacation of office and filling of vacancies; remuneration and allowances and meetings of the Commission.
[159] See in general L Harring & W Odendaal "Kessl: A new jurisprudence for land reform in Namibia?" (2008) Land, Environment and Development Project <http://www.lac.org.na/projects/lead/Pdf/Kessl.pdf> (accessed 04-02-2019) 1-90, 18.

for the position having regard to the functions of the Commission.[160] The primary functions of the Commission are advising and/or making recommendations to the Minister in relation to the powers conferred on him/her in terms of ACLRA and to investigate, upon request by the Minister or *mero motu*, any other matter relating to the powers of the Minister under ACLRA.[161]

Once the State has received an offer from a willing seller it must within 60 days refer the offer to the Commission for consideration.[162] The Commission is then tasked with assessing the offer and making recommendations to the Minister of Land Reform and Resettlement within 30 days after receiving the offer.[163] The Commission is also allowed to inspect the agricultural land in order to ascertain whether it is suitable for acquisition.[164] Subsequently and within 14 days of receiving the Commission's recommendations, the Minister may decline the offer and issue a certificate of waiver[165] or decide to acquire the agricultural land by either accepting the offer or by making a counter offer.[166] Importantly, the land owner may withdraw such an offer in writing at any time before the Minister issues a certificate of waiver;[167] accepts such an offer[168] or makes a counter offer.[169] Once an offer or counter offer is accepted by the Minister or the willing seller, and upon receiving a land tax clearance certificate,[170] the Registrar shall transfer ownership of the land to the State to redistribute the land. The redistribution of the acquired land to beneficiaries, specifically regarding the application procedure; criteria for determining who the beneficiaries of the redistributed agricultural land should be and the order of preference for selecting beneficiaries are discussed further below.[171] Where the State does not intend to acquire the land offered by the willing seller and issues a certificate of waiver, the land becomes available for acquisition on the open market to Namibian citizens only.

[160] Section 4 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[161] Section 3 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[162] Section 17(5) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[163] Section 3 read with section 17(5) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[164] Section 15 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[165] Section 17(6)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[166] Section 17(6)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[167] Section 17(5A)(i) read with sections 17(5) or 17(6)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[168] Section 17(5A)(ii) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[169] Section 17(5A)(ii) read with sections 17(6)(b)(i) or 17(6)(b)(ii) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[170] Section 18 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[171] See section 4 4 below.

4 2 2 A shift towards expropriation

The Namibian government experienced similar problems with its market-led approach to land acquisition as were experienced in South Africa.[172] In general, the land reform process was characterised as being too slow.[173] In this regard, there is disagreement about the reason for the slow pace of land reform.[174] On the one hand, the Namibian government blames the reluctance of farmers to make their land available for acquisition and the use of the WBWS principle under market-led acquisitions. The use of the WBWS principle, in terms of market-led acquisitions was subsequently formally abandoned in 2004.[175] Furthermore, where land was made available it was not necessarily of sufficient quality. On the other hand, farmers blame the government's statutory right of first refusal and the lengthy process associated therewith in acquiring agricultural land for the slow progress. Accordingly, there was a move away from market-led approaches in acquiring agricultural land for land reform purposes early on in Namibia. A gradual shift towards using expropriation for acquisition of agricultural land took place from 2004, as a result of the increase public criticism over the slow pace of land reform.[176]

4 3 Expropriation

4 3 1 Introduction

As mentioned above, article 16(2) of the Namibian Constitution provides the legal basis for expropriation in Namibia.[177] It provides for the expropriation of private property (a) provided that it is in the public interest and (b) subject to the payment of just compensation; (c) in accordance with the procedure for expropriation set out in ACLRA. These requirements are discussed below.

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[172] See Chapter 5, section 2 3 – 2 6 in particular.
[173] M Ingle "Taking stock of land reform in Namibia from 1990-2005" (2011) *New Contree: a journal of historical and human sciences for Southern Africa* 55-70, 65-66; B Fuller & G Eisb "The commercial farm market in Namibia: Evidence from the first eleven years" (15 November 2002) *Institute for Public Policy Research Briefing Paper No 15* 1-16.
[174] Ingle (2011) *New Contree: a journal of historical and human sciences for Southern Africa* 65-66.
[175] Republic of Namibia, "Statement by the right honourable Theo-Ben Guribab, MP, Prime Minister of the Republic of Namibia on the acceleration of land reform in the Republic of Namibia", Windhoek, 25 Feb. 2004; Republic of Namibia, "Ministerial statement by honourable Hifikepunye Pohamba, MP, Minister of Lands, Resettlement and rehabilitation, on expropriation of agricultural land on the 2nd March 2004, in the National Assembly" Windhoek, 2004.
[176] Pienaar (2018) *Namibian Law Journal* 45.
[177] Amoo *Property Law in Namibia* 70. Various pieces of legislation provide for expropriation in Namibia including the Agricultural (Commercial) Land Reform Act 6 of 1995 and the Expropriation Ordinance 13 of 1978.

4 3 2 Public interest

Public interest is not defined in the Namibian Constitution.[178] Instead, Amoo describes it as "a legal requirement falling within the sphere of political definition".[179] Accordingly, it is the State that has to determine what constitutes public interest or public utility and define it in legislation.[180] Different pieces of legislation have been promulgated to empower the State or any other appropriate body to expropriate private property for various purposes.[181] However, the most prominent piece of legislation is the ACLRA. The meaning of public interest, within the context of the Namibian government's land reform endeavour, is provided for in ACLRA: the resettlement of Namibian citizens who do not have any or adequate agricultural land, especially those who have been disadvantaged by past discriminatory practices.[182] This means that, the particular land holding which the government wants to expropriate, must be suitable for resettlement of this specific category of people.[183] Numerous factors should be considered when land is targeted for expropriation. A list of criteria is therefore required to determine what agricultural land is suitable for expropriation and redistribution.[184]

[178] Amoo *Property Law in Namibia* 72; C Treeger "Legal analysis of farmland expropriation in Namibia" (2004) <https://www.nid.org.na/images/pdf/analysis_views/Legal_analysis_of_farmland_expropriation_in_Namibia.pdf> (accessed 05-02-2019) 2. South African law sets out more detailed criteria for the definition of public interest in the context of expropriation. See specifically section 25(4) of the Constitution of the Republic of South Africa, 1996.

[179] Amoo *Property Law in Namibia* 72.

[180] See section 14(1) of the Agricultural (Commercial) Land Reform Amendment Act 14 of 2003 which provides that "the Minister may, out of moneys appropriated by Parliament…acquire in the public interest…agricultural land..." for redistribution purposes. Furthermore, in *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) the judiciary determined that the welfare and interests of farm workers working or residing on commercial agricultural land have to be considered as factors to determine what constitutes public interest.

[181] Amoo *Property Law in Namibia* 72. See for example section 29 of Ordinance 18 of 1954; sections 2 and 3(1) of the Expropriation Ordinance 13 of 1978; section 30 of the Local Authorities Act 23 of 1992; sections 14 and 20 of the Agricultural Commercial Land Reform Act 6 of 1995 and section 126 of the Water Resources Management Act 24 of 2004.

[182] Preamble of the Agricultural (Commercial) Land Reform Act 5 of 1996. See also *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 55-56.

[183] Section 14 of the Agricultural (Commercial) Land Reform Act 5 of 1995; Amoo *Property Law in Namibia* 72-73; Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 272. This is in line with Namibian government's national resettlement policy. See *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 55-57 where the court accepted that land reform, in order to alleviate poverty, was a legitimate public interest.

[184] See 4 3 5 below.

4 3 3 Just compensation

According to Namibian law, "just compensation" is required for an expropriation to be valid.[185] The question in this regard is whether just compensation must reflect the actual market value of the expropriated property.[186]

Section 25 of ACLRA deals with the basis on which the amount of compensation should be determined. The section does not provide for a specified amount of compensation to be paid for agricultural land that is expropriated, but instead establishes a list of criteria for determining the amount of compensation.[187] These considerations include *inter alia* (a) the "value" of the enhancement or depreciation of the property;[188] (b) improvements made to the property;[189] (c) costs associated with the maintenance of the property from the date of expropriation to the date upon which the State takes possession;[190] and (d) the benefit the land owner will receive from any structures the State has built or constructed to compensate any financial loss a person may suffer in consequence of the expropriation.[191] With regard to the first criterion, Treeger explains that "the basic consideration for calculating compensation should be the actual value of the property, which includes enhancements consequent to the usage of the land".[192] Regarding the second criterion, the purpose of taking into account the improvements made to the property in calculating an amount of compensation, is to prevent improvements being made in the knowledge of impending expropriation, with the intention of raising the amount of compensation payable.[193]

The Act does not stipulate that in determining compensation reference should be made to market value.[194] However, the Act specifically provides that the amount of compensation payable for the expropriation of agricultural land shall not exceed:

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[185] Article 16(2) of the Constitution of the Republic of Namibia, 1990 and Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 8; SE Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* Master of Philosophy, Stellenbosch University (2009) 46.
[186] Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 6-7; Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 47, 51.
[187] Section 25(5) of the Agricultural (Commercial) Land Reform Act 6 of 1995; Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 6; Amoo *Property Law in Namibia* 87;Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 47, 51.
[188] The Act does not stipulate how the "value" of the enhancement is determined. However Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 8 suggests that "value" should be regarded as "market value". Sections 25(5)(a), and (d) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[189] Section 25(5)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[190] Sections 21(3) and (4) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[191] Section 25(5)(e)) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[192] Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 8.
[193] 8.
[194] Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 51.

> "the aggregate of the amount which the land would have sold on the date of [the expropriation] notice on the open market by a willing seller and a willing buyer and an amount to compensate any actual financial loss caused by the expropriation".[195]

It is clear that ACLRA contains a reference to the market value "and restricts the amount calculated as compensation to an amount that would be realised on the open market in a willing-seller, willing-buyer scenario".[196] Contrary to the South African position, this means that compensation for an expropriation for the purposes of resettlement under Namibian law can never be above market value.[197] ACLRA also restricts the amount of compensation to an amount required to compensate the actual financial loss. How the actual financial loss is to be calculated, leaves room for interpretation. According to Treeger factors such as, the use of the land or the amount originally paid for the property may be taken into account to determine the actual financial loss.[198]

Moreover, an amount equal to 10% of the total amount of compensation may be added to the total amount payable, if the Commission recommends it.[199] The additional amount, in the form of a *solatium*, may not be more than N$ 10 000.[200] The *solatium*, if payable, may in effect increase the amount of compensation to a value above market value, but should be regarded as an additional amount determined separately from the value of the property being expropriated.

Contrary to the South Africa position, where the time and manner of payment must also be just and equitable,[201] the Namibian Constitution does not prescribe considerations regarding the manner and time of payment of compensation for an expropriation.[202] Treeger explains that although there is no explicit reference in ACLRA to the manner and time of payment of compensation, the requirement of "just compensation" should also cover payment in a just manner and within a just or reasonable time frame.[203] In this regard, the time frame for payment of compensation is dependent on the procedure set out in ACLRA.

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[195] Sections 25(1)(a)(i) and (ii) of the Agricultural (Commercial) Land Reform Act 6 of 1995; Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 8.
[196] Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 8.
[197] 8.
[198] 9.
[199] Section 25(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[200] Section 25(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[201] Section 25(3) of the Constitution of the Republic of South Africa, 1996.
[202] Treeger "Legal analysis of farmland expropriation in Namibia" (2004) 9.
[203] 9.

The Act specifically empowers the Minister, subsequent to receiving a recommendation from the Commission, to elect to expropriate agricultural land.[204] The Minister must then serve the owner of agricultural land with an expropriation notice, which may contain an offer of an amount of compensation.[205] Within 60 days of receipt of the expropriation notice, the owner is required to prepare and submit a written statement indicating inter alia whether or not the offer of compensation is accepted.[206] Where no offer of compensation was made, the owner must prepare and submit a claim for compensation to the Minister.[207] In this regard, the owner must also furnish how the compensation amount is calculated.[208] Following an inspection of the property, the Minister may also make a counter-offer to the owner's claim for compensation, should the Minister deem the owner's claim for compensation to be excessive.[209] If the owner does not accept any offer made by the Minister, then the owner may make an application to the Lands Tribunal for the determination of just compensation for the expropriated property.[210] Accordingly, in cases where owners do not accept the compensation offered by the Minister and the amount is left to be determined by the Lands Tribunal,[211] it may take several months for the owner to receive just compensation for the property.

4 3 4 Procedure

In terms of ACLRA the Minister responsible for land has the power to expropriate private property provided that the power is exercised in terms of the procedures set out in the Act.[212] To prevent the potential abuse of the State's expropriation powers, it is important that procedural safeguards are put in place and followed. Amoo explains that "mere substantive rules are not enough; procedural rules are equally important".[213] Accordingly, the procedure for the process of expropriation provided for in ACLRA is a legal requirement,[214] with the

[204] Section 14 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[205] Section 23(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995. According to section 20(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995, the date on which the State takes possession should not be more than six months after the date of notification of expropriation.
[206] Section 22(1)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[207] Section 22(1)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[208] Section 22 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[209] Section 23 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[210] Section 23(4)(a) read with section 23(6) and section 27 of the Agricultural (Commercial) Land Reform Act 6 of 1995 in general.
[211] Section 27 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[212] Amoo *Property Law in Namibia* 71. See sections 14 and 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995. See further *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC).
[213] Amoo *Property Law in Namibia* 73.
[214] 73.

aim of "ensuring procedural justice, transparency, recognition of the rule of law and the protection of individual rights".[215] The well-known judgment, *Kessl v Ministry of Lands and Resettlement and two similar cases*[216] exemplifies this point.[217] The judgment also set out the correct procedure for a valid expropriation and is therefore necessary to discuss.

4 3 4 1 *Kessl v Ministry of Lands and Resettlement and two similar cases*

4 3 4 1 1 Facts of the case

The case concerned the review of the Ministry's decision to expropriate four farms owned by three different foreign land owners. All three applicants are German citizens and reside in Germany and have owned the farms in question for many years.[218] The respective owners also visit their land holdings regularly.[219] Furthermore, several farm workers and their families reside on the farms.[220]

The respondent is the Minister of Lands, Resettlement and Rehabilitation. In 2004, the Minister, after consulting the Commission at an extraordinary meeting, made the decision to expropriate the applicants' farms. However, various procedural mistakes ensued during the expropriation process. For one, the members of the Commission were not afforded the opportunity to discuss the criteria used to (a) select the farms for expropriation; (b) the purpose of the expropriation; (c) the identity of potential beneficiaries; or (d) how such beneficiaries were to be selected.[221] Furthermore, the inspection of the farms only took place a year after the extraordinary meeting was held to determine which farms should be expropriated. In essence, the Commission could not reach a resolution to justify why the farms in question were chosen to be expropriated, because it had no particulars pertaining to the owners or the farms. However, and interestingly, the applicants received a letter indicating that their farms would be expropriated on the same day the meeting was held. In

[215] Amoo *Property Law in Namibia* 73.
[216] 2008 1 NR 167 (HC). For a detailed discussion of the *Kessl* judgment see Harring & Odendaal (2008) *Land, Environment and Development Project* 1-90; Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 263-274.
[217] Pienaar (2018) *Namibian Law Journal* 45.
[218] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 32, 105. Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 270-271; Harring & Odendaal (2008) *Land, Environment and Development Project* 8-9 for an exposition of the facts.
[219] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 32, 105. Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 270-271; Harring & Odendaal (2008) *Land, Environment and Development Project* 8-9.
[220] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 32; 105 for full information regarding the particulars of the respective owners and their farms.
[221] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 17-22; Pienaar (2018) *Namibian Law Journal* 46.

this regard, the applicants, after receiving the letter, were only afforded the opportunity to make representations seven months after the fact.[222] The applicants requested documents and information regarding the expropriation, but never received such information on which to base their representations. In 2005, an expropriation notice was issued and signed by the Minister.[223] Accordingly, the applicants, alleging that the Minister did not follow the correct procedure, instituted action. The Court was asked to review and set aside the decision and the corresponding notices of the Minister to expropriate the farms.

4 3 4 1 2 The legal issues of the case

While the applicants conceded that the government of Namibia had the right to expropriate agricultural land under certain conditions[224] two main issues formed the basis of the legal challenge:[225] Firstly, whether the *audi alterem partem* principle was relevant in expropriation cases and secondly, whether the government of Namibia followed the correct procedure for the expropriation to be valid.[226] Pienaar notes that it is not the fact that the expropriation was resorted to which is questionable, but rather the manner in which the expropriation took place.[227] Each of these issues are discussed separately.

The first issue is whether article 18 of the Constitution, which guarantees administrative justice, is applicable in expropriation cases.[228] If the article applies, it would mean that the common law principles of natural justice, which include the *audi alterem partem* principle, would be applicable in expropriation cases.

It was argued on behalf of the respondent that the only requirements for a valid expropriation are found in article 16(2) of the Constitution, which excludes the *audi alterem partem* rule.[229] However, it was submitted that this argument is untenable.[230] It was argued that the *audi alterem partem* principle under article 18 of the Namibian Constitution[231] cannot be excluded because:

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[222] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 17-22.
[223] Paras 17-22.
[224] Para 1.
[225] Paras 2, 33.
[226] Paras 2, 33.
[227] Pienaar (2018) *Namibian Law Journal* 46.
[228] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 33, 39-41.
[229] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 44.
[230] Para 44.
[231] Article 18 of the Constitution of the Republic of Namibia, 1990 provides for the right to administrative justice. Under the common law the audi alterem partem principle is part of the right to administrative justice.

> "it provides for the testing of actions of administrative bodies or officials against the requirements of fairness, reasonableness and legality, namely compliance with the provisions of the law and the relevant legislation…". [232]

The Court agreed with this argument and held that article 16(2) of the Constitution should not be "walled in"[233] to operate in isolation of other human rights to exclude the principles and rules of natural justice.[234] In this context the Court held that this means that the Minister must apply the rules of natural justice before making a decision to expropriate property.[235] Therefore, the land owner must be afforded the opportunity to be heard and to place all the relevant considerations before the decision-maker to persuade him or her not to expropriate his or her property.[236] *In casu*, the Minister invited the applicants in a letter to make representations. However, the letter did not provide information regarding the basis for the Minister's decision to expropriate the farms. Furthermore, the applicants, after requesting more information, did not receive a reply from the Minister. Accordingly, the Court found that the Minister had violated the applicants' right to be heard, because he was obliged to provide the applicants with the relevant information, in order for them to make representations on the basis of the information received.[237]

The judgment is important because it directs the government to adhere to the requirements of articles 16(2) and 18 of the Constitution during the expropriation process.[238] If the land owner is not afforded the opportunity to be heard, the expropriation will be regarded as invalid and the expropriation process would have to start afresh. It is thus critical that, during the expropriation procedure, the rules of natural justice are adhered to. The expropriation procedure must also be followed in accordance with the provisions of ACLRA. In other words, both the common law (natural law) and statutory requirements set out in ACLRA have to be followed for the expropriation to be valid.

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[232] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 44.
[233] Para 45.
[234] Para 45.
[235] Paras 47-48; See also RJ Purshotam "The expropriatee's rights to a hearing before the decision is made to expropriate" (1994) 111 *South African Law Journal* 237-240 in general.
[236] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 49.
[237] Para 54.
[238] Pienaar (2018) *Namibian Law Journal* 47.

This leads to the second issue addressed by the Court, namely whether the government followed the correct procedure as provided for in ACLRA.[239] In this regard, the Court divides the discussion of the correct expropriation process the Minister must follow into two processes/stages, which it refers to as a "double-barrel process".[240] A number of procedural requirements have to be fulfilled for the expropriation to be valid during the first and/or second process. These requirements are discussed below.

The first of the two staged expropriation processes is where the Minister informs the land owner that the government is interested in purchasing the land, and the parties enter into negotiations for the purchase of the farm.[241] Importantly, the Court held that the expropriation process cannot take place if there was no previous attempt to acquire the land by way of market-led approaches.[242] It follows that the expropriation process is a method of last resort. Accordingly, once it is clear that the Minister and the owner are unable to negotiate the sale of the property by way of mutual agreement[243] or where the whereabouts of the owner cannot be ascertained to negotiate a sale,[244] the Minister may expropriate the property in accordance with the procedure set out in ACLRA.

During the first stage of the expropriation process, an investigation must be lodged to determine whether the particular farm or piece of land is suitable for resettlement.[245] The Minister must thus acquire adequate information to determine whether the agricultural land is suitable.[246] The role of the Commission becomes important in this regard.[247] The Commission is required to carry out investigations and make recommendations to the Minister regarding the suitability of the land.[248] These investigations have to take place before the Minister decides to acquire the property.[249] This procedural step allows the Minister to come to a well-informed and considered decision as to whether the agricultural land is suitable.[250] *In casu*, the Commission did not investigate the farms *mero motu* or on

[239] Section 14, read with section 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[240] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 56.
[241] Paras 57, 73; section 14 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[242] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 56, 70, 73.
[243] Section 20(1)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[244] Section 20(1)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[245] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 57.
[246] Section 20(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[247] Harring & Odendaal (2008) *Land, Environment and Development Project* 18.
[248] Section 15 read with section 20(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995; *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 57, 59, 88-89.
[249] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 61.
[250] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 59.

request of the Minister as required by ACLRA.[251] Accordingly, no criteria were identified to determine whether the particular farms in question were suitable for expropriation.[252] Once there has been an investigation with regard to the suitability of the agricultural land and the parties are unable to negotiate a sale of the property, then only may the Minister expropriate the property.[253]

The second stage of the process thus entails the expropriation of the property. A number of procedural requirements have to be adhered to for the expropriation to be valid. Firstly, the Minister is procedurally obligated to inform the land owner of his or her decision to expropriate the property by way of service of notice on the particular land owner.[254] The notice itself must also contain the relevant information as required by ACLRA.[255] Secondly, at this stage, the Commission has an obligation to consider the interests of any persons employed or lawfully residing on the land, as well as the families of such persons.[256] Once the interests are considered, the Commission may recommend to the Minister, *inter alia*, what to do with the possibly displaced persons.[257] *In casu*, the Commission failed to consider the interests of the persons living on the respective farms.[258] The Minister could therefore not determine whether it would be in the public interest to displace all the persons and their families working and/or residing on the farm.[259] In fact, information regarding the relevant persons who would be affected by the expropriation was non-existent.

4 3 4 1 3 The judgment and order of the court

In writing its judgment, the Court provided guidelines and set out the sequence of steps the Minister has to take for the expropriation to be valid.[260] In essence the guidelines provided that: (a) the Minister, acting on the advice or guidance of the Commission, is the only

[251] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 59, 77; section 20(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[252] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 60. See section 20(1A) of the Agricultural (Commercial) Land Reform Act 6 of 1995 which provides that the Minister may prescribe criteria to be used for the expropriation of agricultural land. Section 20(1A) was inserted by the Agricultural (Commercial) Land Reform Amendment Act 1 of 2014.
[253] Section 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[254] Section 20(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995; *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 62.
[255] See section 20(2)(a)-(e)) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[256] Section 20(6) of the Agricultural (Commercial) Land Reform Act 6 of 1995; *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 63.
[257] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 64-65.
[258] Paras 64, 80.
[259] Paras 64-65.
[260] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 75, 118.

authority who has the power to decide whether to expropriate agricultural land; (b) the procedural requirements, including investigations regarding the suitability of the property for resettlement and proper consultations with the Commission, must be followed whenever the Minister decides to acquire agricultural land; (c) the Minister must observe the principle of *audi alterem partem* by affording the land owner the right to be heard by inviting representations and by responding to such representations; and (d) the land owner must be notified of the Minister's decision to expropriate his or her property and such notice must be served on the particular land owner.[261]

In conclusion, the Court found that the cumulative effect of all the mistakes and failures by the Minister and the Commission to comply with the Constitution and the procedural requirements of the first and second stages of the expropriation process set out in ACLRA, resulted in the infringement of fundamental rights.[262] The Court had no choice but to set aside the decision and notices to expropriate the respective farms.[263] The Minister, if the constitutional and procedural requirements had been followed, could still decide to expropriate the farms, but the expropriation process would have to start anew.

4 3 4 1 4 Thoughts on the *Kessl*-judgment

A well-administered land expropriation model, founded on legality, transparency, and the principles of natural justice, is critical in the land reform process.[264] Despite the Court's effort to reiterate the importance of the rule of law and to set out the correct procedure to be followed for the expropriation process to be valid,[265] the case illustrates an array of problems, including *inter alia* (a) a complete disregard for the rule of law; (b) a lack of transparency in the Ministry and between the Ministry, land owners and potential beneficiaries; and (c) administrative and capacity problems within in the Ministry.[266] In fact, Pienaar points out that it is still unclear on what basis the farms were expropriated.[267] She questions whether it was due to the fact that the land owners were foreigners, whether they were absentee owners or whether it was because the owners were both foreign and

[261] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) Para 118.
[262] Para 117.
[263] Para 119.
[264] Harring & Odendaal (2008) *Land, Environment and Development Project* 4, 27; Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 274.
[265] Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 274.
[266] Harring & Odendaal (2008) *Land, Environment and Development Project* 4, 27; Pienaar (2018) *Namibian Law Journal* 47; Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 274; Pienaar (2018) *Namibia Law Journal* 7-9.
[267] Pienaar (2018) *Namibian Law Journal* 47.

absent.[268] Furthermore, the Commission never conducted investigations regarding the suitability of the agricultural land for expropriation,[269] which resulted in the Minister making an ill-informed and unfounded decision to expropriate the farms.[270] The lack of criteria for determining whether the farms were suitable for expropriation also resulted in the lack of information provided to the land owner.

Overall, in order to facilitate and ensure a transparent expropriation process, in line with the rules of natural justice and the procedure set out in ACLRA, it is clear that criteria for the identification of suitable agricultural land for expropriation are critical.[271] Subsequent to the *Kessl* judgment, ACLRA was amended to provide the Minister with the authority to prescribe criteria to be used for the expropriation of agricultural land.[272] These criteria are discussed below.

4 3 5 Criteria for expropriating agricultural land

The criteria used for identifying suitable agricultural land for expropriation are provided for in regulations.[273] The regulations specifically provide that if the Minister decides to expropriate property, the Minister is obliged to (a) use the identification criteria in selecting agricultural land eligible for expropriation;[274] and (b) conduct a suitability assessment to determine if the agricultural land is suitable for resettlement.[275]

For purposes of identifying whether the agricultural land is eligible for expropriation the following must be ascertained, *inter alia*: (a) the ownership of the land with the deeds registry as well as any condition imposed on the property;[276] (b) whether the agricultural land is owned by a citizen or foreign national;[277] and (c) whether the agricultural land is owned by a natural or juristic person.[278] Other considerations also come into play, such as whether

[268] Pienaar (2018) *Namibian Law Journal* 47.
[269] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) paras 59-61.
[270] Pienaar (2018) *Namibian Law Journal* 47.
[271] 62.
[272] Section 20(1A) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[273] See Regulations on criteria to be used for expropriation of agricultural land GN 209 of 2016 *GG* 6115 (1 September 2016), read with section 20(1A) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[274] Regulation 2(1)(a) on criteria to be used for expropriation of agricultural land.
[275] Regulation 2(1)(b) on criteria to be used for expropriation of agricultural land.
[276] Regulation 3(2)(a) on criteria to be used for expropriation of agricultural land.
[277] Regulation 3(2)(b) on criteria to be used for expropriation of agricultural land.
[278] Regulation 3(2)(c) on criteria to be used for expropriation of agricultural land.

the agricultural land is managed and by whom;[279] leased;[280] abandoned by the owner;[281] neglected or under-utilised;[282] and whether it will contribute to the utilisation of adjacent State land.[283]

As mentioned above, the Minister must also determine whether the identified land is suitable for resettlement.[284] In doing so, the Minister must on the basis of the assessment report of the Commission establish and verify (a) the size of the agricultural land;[285] (b) the location of the land;[286] (c) the infrastructure on the land;[287] and (d) "the climate, relief and soil of the land".[288] Furthermore, each of these considerations have specific factors which have to be taken into account and scored.

The agricultural land must also be scored in accordance with the scoring criteria provided for in the regulations.[289] In this regard, the regulations provide for a checklist and formula to determine whether the agricultural land is either highly suitable; suitable; moderately suitable; or not suitable. The formula[290] provides that the total score is calculated by adding the scores pertaining to the identification criteria and the suitability criteria together and subtracting the citizenship preference[291] criteria. The regulations provide that:

> "A score of (a) at least 80 percent is considered as highly suitable for expropriation; (b) 60 percent to 79 percent is considered as suitable for expropriation; (c) 40 percent to 59 percent is considered as moderately suitable for expropriation; and (d) less than 39 percent is considered not suitable for expropriation."[292]

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[279] Regulation 3(2)(d)(i) on criteria to be used for expropriation of agricultural land.
[280] Regulation 3(2)(d)(ii)) on criteria to be used for expropriation of agricultural land.
[281] Regulation 3(2)(d)(iii) on criteria to be used for expropriation of agricultural land.
[282] Regulation 3(2)(d)(iv) on criteria to be used for expropriation of agricultural land.
[283] Regulation 3(2)(d)(vi) on criteria to be used for expropriation of agricultural land.
[284] Section 14(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995 read with regulation 4 on criteria to be used for expropriation of agricultural land in general.
[285] Regulation 4(1)(a) on criteria to be used for expropriation of agricultural land.
[286] Regulation 4(1)(b) on criteria to be used for expropriation of agricultural land.
[287] Regulation 4(1)(c) on criteria to be used for expropriation of agricultural land.
[288] Regulation 4(1)(d) on criteria to be used for expropriation of agricultural land.
[289] Regulation 2(2) on criteria to be used for expropriation of agricultural land GN 209 of 2016 *GG* 6115 (1 September 2016).
[290] The regulations provide the following: Scores of identification criteria + suitability criteria – citizenship preference criteria = total scores.
[291] In terms of the citizenship preference criteria, the regulations distinguish between agricultural land owned by: (a) a Namibian natural person; (b) a Namibian citizen who's land is adjacent to a resettlement farm or State land; and (c) a Namibian juristic person.
[292] Regulation 5 on criteria to be used for expropriation of agricultural land GN 209 of 2016 *GG* 6115 (1 September 2016).

In terms of the scoring system, agricultural land owned by Namibian citizens are less likely to be expropriated than foreigners due to the weight attached to the citizenship-component of persons.[293]

4 4 Policies and schemes for the redistribution of agricultural land

4 4 1 Introduction

Once agricultural land is acquired by way of market-led approaches or expropriation under ACLRA, the land needs to be redistributed to suitable beneficiaries. ACLRA does not provide for an application procedure for redistribution or resettlement, nor does it set out criteria for determining who the beneficiaries of the redistributed land should be. A selection process is likewise absent. In this regard, different schemes and policies are provided, aimed at promoting and/or providing for the redistribution of agricultural land and resettlement of beneficiaries on such land. Depending on the scheme or policy, the application procedure criteria for determining who the beneficiaries should be and the selection process of the beneficiaries, will differ.

However, as a point of departure, ACLRA provides that land available for acquisition on the open market, or land acquired by the State through expropriation should be redistributed to Namibian citizens only, specifically "Namibian citizens who do not own or otherwise have the use of any or of adequate land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices".[294] Accordingly, regardless of the policy or scheme, the threshold to qualify as a beneficiary under the redistribution programme in general is citizenship.

This section provides a brief overview of (a) the Affirmative Action Loan Scheme; (b) the *National Resettlement Policy* and Scheme; and (c) the *Revised National Resettlement Scheme* available to beneficiaries that promote and/or provide for the redistribution of agricultural land in Namibia. Under each policy and scheme the selection of beneficiaries and the rights obtained in relation to the redistributed land will be discussed. In essence the first mentioned scheme focuses on establishing emerging commercial farmers on

[293] Depending on whether the agricultural land is owned by (a) a Namibian natural person; (b) a Namibian citizen who's land is adjacent to a resettlement farm or State land; and (c) a Namibian juristic person, either 15 or 25 points are substracted from the identification and suitability criteria, which makes it less likely that citizens will be expropriated.

[294] Preamble of the of the Agricultural (Commercial) Land Reform Act 6 of 1995. See T Falk, M Kirk, D Lohmann, B Kruger C Hüttich & R Kamukuenjandje "The profits of excludability and transferability in redistributive land reform in central Namibia" (2017) 34 *Development Southern Africa* 314-329, 316.

agricultural land, whereas the latter two schemes and policies focus on the resettlement of emerging communal farmers and the landless.

4 4 2 The Affirmative Action Loan Scheme

The Affirmative Action Loan Scheme ("AALS") was introduced by the Agricultural Bank Amendment Act 27 of 1991 and the Agricultural Bank Matters Amendment Act 15 of 1992. The AALS is a market-based scheme that creates access to agricultural land and contributes to the redistribution of agricultural land to emerging Namibian farmers.[295] The primary objective of the AALS was therefore to resettle well-established and strong communal farmers on commercial agricultural land in order to minimise the pressure on grazing in communal areas.[296]

The AALS acts as a mechanism through which formerly disadvantaged Namibian farmers can purchase agricultural land with the help of a subsidised loan.[297] Importantly, the beneficiaries are the purchasers of the agricultural land on the open market, as opposed to the State under the other schemes and policies discussed below. In terms of the AALS the Agricultural Bank of Namibia advances funds to previously disadvantaged farmers at subsidised interest rates.[298] The loans are provided at a low interest rate and payable over a long period of time, namely 25 years.[299] In this regard, the Agribank offers flexible instalments options (monthly, quarterly; biannual; or annual) to suit the financial needs of each applicant.

The application process for a loan under the AALS is done in much the same manner as when applying for a loan at a commercial bank. To qualify for a loan under the AALS, there are certain requirements that an applicant must fulfil. Firstly, the applicant must be a

[295] Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 56.
[296] W Odendaal *Our Land We Farm: An analysis of the Namibian Commercial Agricultural Land Reform Process* (2005) Land, Environment and Development (LEAD) project 28.
[297] Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 55-56. See in general Anonymous "The impacts of land reform on livelihoods in Namibia: Part B" (2010) *Namibian Country Report* <https://www.plaas.org.za/sites/default/files/publications-pdf/Livelihoods%20After%20Land%20Reform%20-%20report%20for%20web%20-%20Section%20B.pdf> (accessed 05-02-2019) 58-84.
[298] B Fuller "Improving tenure security for the rural poor" (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 1-35, 6, 12-13; Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 56.
[299] Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 56.

Namibian citizen.[300] Secondly, the person must own a minimum of 150 large livestock units (such as cattle) or 800 small livestock units (such as goats and sheep)[301] "or own productive livestock equivalent to at least 35% of official carrying capacity of the farm which, he/she intends purchasing, and /or have the financial capacity to purchase such livestock".[302] Thirdly, applicants should either be full- or part-time farmers. Fourthly, the applicant must have a clean credit record. Lastly, the applicant must provide a purchase contract and a business plan.[303]

As mentioned, the scheme distinguishes between full-time and part-time farmers as potential applicants. Initially, only full-time farmers were eligible to apply for a loan under the AALS. However, in 1997 the programme was amended to allow part-time farmers to also participate under the AALS.[304] This change enabled members of the emerging Black middle and upper classes to purchase farms.[305] Full-time farmers who purchase commercial farms under this programme receive an initial three-year exemption from repayment on a 20 year loan. The capital amount is then paid over 22 years at an escalating interest rate.[306] By way of contract, part-time farmers may decide to either (a) repay the interest portion only for the first 3 years and pay the outstanding amount over 22 years at the appropriate interest rate thereafter;[307] or (b) capitalise the interest portion for the first 3 years and thereafter pay the outstanding amount over 22 years at the appropriate interest rate.[308]

Under the AALS beneficiaries (Namibian citizens who are full-time or part-time farmers) obtain freehold in commercial farms. In other words, AALS beneficiaries gain ownership and all the entitlements associated with ownership, to their land. However, farmers are not allowed to sell their farms in the first 10 years of occupation.

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[300] AgriBank Namibia "Affirmative Action Loan Scheme (AALS)" <http://agribank.com.na/product/affirmative-action-loan-scheme-aals-1> (accessed 21-09-2018); Fuller (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 6, 12-13.
[301] AgriBank Namibia "Affirmative Action Loan Scheme (AALS)"; Fuller (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 6, 12-13; Vermeulen A comparative assessment of the land reform programme in South Africa and Namibia 55-56.
[302] AgriBank Namibia "Affirmative Action Loan Scheme (AALS; Fuller (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 6, 12-13.
[303]AgriBank Namibia "Affirmative Action Loan Scheme (AALS)"; Fuller (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 6, 12-13.
[304] Fuller (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 6.
[305] 6.
[306] AgriBank Namibia "Affirmative Action Loan Scheme (AALS)".
[307] AgriBank Namibia "Affirmative Action Loan Scheme (AALS)".
[308] Odendaal *Our Land We Farm: An analysis of the Namibian Commercial Agricultural Land Reform Process* (2005) Land, Environment and Development (LEAD) project 28; AgriBank Namibia "Affirmative Action Loan Scheme (AALS)".

The AALS has arguably contributed to the redistribution of agricultural land in Namibia by providing an avenue for full- or part-time farmers to obtain land. Vermeulen states that agricultural land for sale on the open market is acquired at a faster rate by AALS beneficiaries than by the State, which may have an adverse impact on beneficiaries under the resettlement scheme discussed below.[309]

Despite the contribution to the redistribution of agricultural land, the AALS scheme is not without its problems. For example, notwithstanding the requirement that applicants must have a clean credit record, one of the major problems is the number of loan defaults.[310] Two main reasons are averred in relation to this problem. Firstly, it is averred that farmers with minimal cash or capital reserves apply for a loan under the AALS. It may mean that farmers drain their cash assets to make the down payment. Fuller argues in this regard that the loan defaults are also attributed to cases where farmers are unable to cope with the vagaries of farming.[311] For example, in a period of drought (which Namibia experiences quite frequently),[312] productivity is reduced and would require a farmer to sell some of his or her original stock to maintain the farm. This is problematic because "loan repayment calculations are based on the 3 year grace period providing sufficient time for additions to the livestock herd and subsequent ability to generate the income required to meet bond obligations".[313] In cases of drought such income cannot be regenerated and the farmer accordingly defaults on his or her loan. Secondly, it is also postulated that a lack of proper preparation and training for the beneficiaries of the loan attribute to loan defaults.[314] For example, while communal farmers may have large herds, many have very little knowledge of business operations and/or what is required to maintain production and profitability of farming enterprises.[315]

[309] Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 56.
[310] Fuller (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 13.
[311] 17.
[312] See for example, Anonymous "More than 500,000 at risk in drought-hit Namibia" *BBc News* (7 May 2019) <https://www.bbc.com/news/48185946> (accessed 12-09-2019); Food and Agriculture Organization of the United Nations, "Drought management in Namibia" *FAO* <http://www.fao.org/3/a-x6180e.pdf> (accessed 12-09-2019).
[313] Fuller (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 17.
[314] 17.
[315] 17.

4 4 3 The National Resettlement Policy and Scheme

Under the *National Resettlement Policy* ("NRP") and Scheme the State buys large-scale commercial farms on a WBWS basis for subdivision[316] and allocation to small-scale farmers or beneficiaries.

In Namibia, resettlement is directly linked to the distribution of commercially viable agricultural land. In 2001, the Ministry of Lands, Resettlement and Rehabilitation released the NRP. Under the 2001 NRP, resettlement entailed a "movement of people from an area with insufficient resources to one which is more likely to provide a satisfactory standard of living".[317] The overarching aim of the NRP was therefore to redress the past imbalances in the distribution of natural resources (in particular land)[318] by means of making the landless self-reliant, either in terms of food production or self-employment.[319]

Importantly, not every previously disadvantaged citizen will qualify and be selected as beneficiaries under the resettlement programme.[320] Accordingly, the Ministry of Lands and Resettlement provides for qualifying and resettlement criteria[321] to select the most appropriate applicants for each farming unit. The main target groups under the NRP were members of the San community; ex-soldiers; displaced or destitute and landless persons; people with disabilities and people from overcrowded communal areas.[322] These groups are further divided into (a) people who have neither land; income nor livestock; (b) people who have neither land or income, but have livestock; and (c) people who do not have land but who have income and livestock and are in need to be resettled.[323]

These targeted groups first have to meet qualifying criteria in order to be regarded as beneficiaries under the resettlement programme.[324] These qualifying criteria entail that an applicant must (a) be a Namibian citizen; (b) be at least 18 years of age; (c) have no more than 150 large stock units or 800 small stock units; and (d) not own any land, other than for

316 Section 38 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
317 Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 6.
318 3.
319 Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 2 and 3 for objectives including to redress the past imbalances in the distribution of natural resources, in particular land.
320 Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* <http://209.88.21.57/documents/20541/88025/Resettlement_Criteria.pdf/88db4b77-0fb4-472a-a271-8a8441c5ce4d> (accessed 06-02-2019) 4.
321 Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* in general.
322 Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 3-5; Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 2.
323 Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 3.
324 Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 2.

residential purposes.[325] Importantly, people who have more than 150 large stock units or 800 small stock units, or the equivalent thereof, will automatically not be eligible for resettlement under the NRP. Instead, such persons qualify for a loan under the AALS and will be regarded as emerging farmers.[326] Accordingly, the AALS is tailored for and aimed at *emerging* black farmers, whereas the resettlement programme is aimed at *the poorest of the poor*. In this regard there is a very distinct synergy between the operation of the AALS and the NRP. Applicants can either be regarded at AALS beneficiaries or as NRP beneficiaries, but not both.

If a person meets the qualifying criteria, it does not mean that such a person will be resettled automatically.[327] Once the targeted groups meet the qualifying criteria, various other criteria are used to select the most appropriate beneficiary for every farming unit.

To promote the productivity of farms,[328] the ability to farm productively is pivotal to the social and economic success of the resettlement programme. Accordingly, the primary beneficiaries are previously disadvantaged farmers.[329] In light of the need of beneficiaries to be able to farm productively, the criteria for selection are: (a) agricultural background; (b) age; (c) gender; (d) generational farm workers;[330] (e) literacy; (f) current agricultural income (number of livestock); and (g) applicants from communal areas.[331]

Based on these criteria, an ideal beneficiary should be a woman[332] between the age of 26 and 60,[333] who is a generational worker[334] from a communal area;[335] and who is solely dependent on farming; has experience in agricultural activities or who is trained in agriculture

[325] Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 2; Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 5.
[326] Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 5.
[327] Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 2.
[328] 4.
[329] Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 4. A farmer is regarded as a person engaged in any form of agriculture including livestock production; horticulture; and game farming.
[330] Generational farm workers are generally considered to be those persons who have been working on a farm for a least a generation or longer, often leaving them with no roots in any other settlement area, village, town or city.
[331] Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 5-7.
[332] 6, 10.
[333] 5, 10.
[334] 6, 11.
[335] 7; 11.

but has no access to land;[336] has the necessary basic reading and writing skills (grade 6 level)[337] and who owns less than 150 large stock or 800 small stock units.[338]

In this context, a "single uniform selection system",[339] namely a point scoring system, is used to evaluate and select beneficiaries. This resettlement criteria policy recognises that the "scoring system" may not be a sufficient tool for the selection of the most appropriate beneficiaries. However, the process refines suitable candidates and adds a measure of transparency and consistency to the selection process.[340] Each criterium considered is appraised by a point system with a scale of between 1 and 5, whereby 5 is the most desirable grade.[341] The applicant with the highest total score is regarded as the most suitable for resettlement.[342] Where two or more applicants have the same score, additional factors such as provided for in the Affirmative Action (Employment) Act 29 of 1998[343] or "regional balance"[344] can be applied to determine the most suitable applicant for resettlement.[345]

All applications are considered by the Regional Resettlement Clerks before sending it to the Regional Resettlement Committees.[346] There are 13 Regional Resettlement Committees nation-wide which each select one candidate to be endorsed by the Commission. Out of the proposed candidates, the Commission selects and proposes one person and makes a recommendation to the Minister for final approval.[347]

The models proposed under the NRP include individual farming units, often referred to as the Farm Unit Resettlement Scheme ("FURS"); group farming units of groups of more than one person who cannot form a co-operative but are interested in agricultural production as a group and co-operative farming units or other legal entities such as companies and close corporations.[348] In terms of FURS any Namibian citizen who has been socially,

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[336] Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 5, 10.
[337] 6, 11.
[338] 7, 11.
[339] 2.
[340] 2-3.
[341] 3.
[342] 3.
[343] Under section 18 of the Affirmative Action (Employment) Act 29 of 1998 such factors include: Racially disadvantaged persons, women and persons with disabilities.
[344] Or "regional spread" of successful applictions, in terms of the regions in which they will be resettled and in terms of the regions from which they originate. In this regard, the regional spread of the applications will be considered by the LRAC when making it's decision to allot a parcel of land to a particular beneficiary.
[345] Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 3.
[346] 8.
[347] 8.
[348] Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 7.

economically, or educationally disadvantaged by past discriminatory laws can apply for an allotment of land acquired for resettlement by the State. Under FURS, successful applicants are allotted a small farm, measuring at least 1500 ha for the northern parts of Namibia and 3000 ha in the more arid southern parts of Namibia.[349] Land acquired for resettlement/redistribution purposes under ACLRA is allocated to successful applicants in terms of the resettlement criteria on leasehold of 99 years.[350] The right of leasehold is registered under the Deeds Registries Act 47 of 1937. Accordingly, beneficiaries will not become the owner of the agricultural land, but will have legally secure occupational and agricultural rights. [351]

4 4 4 A revised National Resettlement Policy

A *revised National Resettlement Policy (2018-2027)* has also been released. The revised Policy identifies a number of problems stemming from the operation of the NRP which should be addressed.[352] These problems include: the unfair allocation of acquired land;[353] poor agricultural productivity on allocated resettlement land; an absence of pre- and post-settlement support; a lack of effective monitoring and evaluation of the resettlement process and poor stakeholder involvement and coordination.[354] In light of the numerous problems identified, the revised Policy "aims to introduce a comprehensive resettlement policy instrument for addressing landlessness amongst the multitude of previously disadvantaged Namibians in an efficient and effective manner."[355]

The same target or beneficiary groups, as under the NRP, are identified under the revised Policy. The same criteria as discussed above are also used to select the most suitable applicant for resettlement.[356] However, the revised Policy categorises the potential

[349] However, see in general Anonymous "The impacts of land reform on livelihoods in Namibia: Part B" (2010) *Namibian Country Report* <https://www.plaas.org.za/sites/default/files/publications-pdf/Livelihoods%20After%20Land%20Reform%20-%20report%20for%20web%20-%20Section%20B.pdf> (accessed 05-02-2019) 85-109.
[350] Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 6.
[351] 6.
[352] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 11.
[353] According to the Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 11: "Some feel that the land acquired is being allocated to those without capacity to put it to productive use. On the other hand, the less privileged feel that current selection criteria favours the already privileged or well-off individuals, land reform according to them should rather aim to address the poverty situation of the impoverished".
[354] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 11-12.
[355] 12-13.
[356] See 4 4 1 2 above.

beneficiaries, into three main groups, namely (a) commercial farmers; (b) communal farmers; and (c) non-farming individuals who are in need of resettlement.[357]

In line with these categories, the revised Policy makes provision for new resettlement land occupation models.[358] These resettlement models are tailored to the varying land needs of the eligible beneficiary groups and which can accommodate the different farming systems in Namibia.[359] The models are the (a) High Economic Value (Commercial) Model ("HEVM"); (b) Moderate Economic Value (Commercial) Model ("MEVM") and (c) the Low Economic Value (Commercial) Model ("LEVM"). Each of these models are discussed briefly.

In terms of the HEVM landless commercial farmers, farming on privately owned or State leased agricultural land, are targeted. The model requires land to be allocated as full undivided entities to carefully selected and tried beneficiaries practicing commercial farming on land acquired by the State.[360] In other words, subdivision or partitioning of land is discouraged, because it may limit or impact negatively on the productivity and environmental protection of the land.[361] Under this model, large farms or parcels of agricultural land are distributed to a few beneficiaries. The small number of actual beneficiaries is regarded as a major drawback of the Policy.

The lease will be for a maximum of 10 years depending on the proposed agricultural venture.[362] For a minimum of a three year probation period, the rent of the land will be free.[363] During the probation period, beneficiaries should be able to use the land productively with minimum financial or other support from the State.[364] Importantly, the beneficiaries will have the option to purchase the land at the end of the probation period or at the end of the 10 year lease period.[365] However, the model also proposes that, depending on the farming venture, tailored pre- and post-settlement support should be provided from the outset of the resettlement process.[366] Furthermore, beneficiaries opting to acquire their farms at the end of their successful probation period, or at the end of the 10 year lease period may gain

[357] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 17.
[358] 18.
[359] 18.
[360] 19.
[361] 19.
[362] 20.
[363] 20.
[364] 20.
[365] 21.
[366] 20.

financial assistance under the AALS to purchase the land in question.[367] Accordingly, beneficiaries will have the opportunity to convert their leasehold into freehold title and will be provided financial assistance to do so.

The MEVM targets established communal farmers whose farming operations' success is threatened by the limited environmental resources in the area in which they operate.[368] For example, poorly managed shared grazing may threaten the success of the farming enterprise.[369] The model will serve as a "bridging model"[370] between the beneficiaries targeted under the HEVM and the LEVM. Accordingly, the MEVM specifically targets people who have demonstrated through their ongoing farming ventures in communal areas that they are able to farm commercially, given the opportunity.[371] The model also allows for the subdivision or partitioning of land into farming units to ensure the distribution to a wider spectrum of beneficiaries.[372] Such units are then leased to the beneficiaries for a probation period. Similar to the HEVM the rent of the land will be free for at least three years.[373] Furthermore, depending on the agricultural venture, tailored pre- and post-settlement support should be provided to beneficiaries during the probation period.[374] The MEVM further provides that beneficiaries who fail to satisfy the probation conditions during or at the end of the probation period should be removed in favour of other eligible beneficiaries capable of ensuring agricultural productivity. Beneficiaries, who successfully complete their probation, will not obtain ownership of the land. Instead, beneficiaries who successfully complete their probation may be granted "a maximum of 50 year renewable, inheritable and transferable lease".[375]

The LEVM targets landless citizens who are not leasing commercial agricultural land or farming in communal areas.[376] For example, groups of people identified under this model are former farm workers; retired professionals; or pensioners who have no income or secure place to live.[377] Accordingly, some of these landless citizens may have some farming

[367] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 21.
[368] 21.
[369] 21.
[370] 21-22.
[371] 22.
[372] 22.
[373] 22.
[374] 23.
[375] 22. See also Chapter 5, 2 4 2 above. The State Land Lease and Disposal Policy also makes provision for a long-term lease once the probation period is complete.
[376] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 23.
[377] 23.

experience. The beneficiaries under this model are those who do not want to farm, at least not commercially, but are landless and in need of land or resettlement in the form of access to land and basic services such as housing, water and sanitation and social services.[378] This model recognises that there are people with low or no income with various land needs. In this regard, small units of land, not exceeding 50 hectares, are allocated to the beneficiaries for subsistence living. These small units of land are leased to the beneficiaries.[379] Only beneficiaries under the HEVM will have the option to acquire freehold title. Those beneficiaries falling under the MEVM or the LEVM will only be entitled to lease the piece of land.

4 5 Recent developments: The 2018 National Land Conference

In light of the slow pace of land reform in general, the Namibian government held a second National Land Conference in October 2018. The primary aim of the 2018 Land Conference was to address the structure of land ownership in Namibia.[380] In light of this aim, the progress made towards the implementation of the resolutions of the 1991 National Land Conference was reviewed. A number of resolutions relating to commercial land reform programmes were made in particular.

Firstly, it was resolved that the WBWS principle, as a primary method of acquiring agricultural land, would be abolished.[381] Instead, expropriation will be used as the primary approach of acquiring agricultural land, but within the confines of the Constitution. It was also resolved to develop national land valuation models, which would regulate agricultural land prices[382] and assist in determining what would constitute "just compensation" for expropriated commercial agricultural land.[383] Secondly, with regard to the expropriation of agricultural land, the following resolutions were agreed upon: (a) foreign owned agricultural

[378] Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 24.
[379] 24.
[380] Ministry of Land Reform "Purpose of the 2nd Land Conference" <http://209.88.21.57/web/ministry-of-lands-and-resettlement/land-conference1> (accessed 06-04-2019).
[381] D Friedman "Namibia takes SA's lead in pursuing land expropriation" (9 October 2018) *The Citizen* <https://citizen.co.za/news/south-africa/2020077/namibia-takes-sas-lead-in-pursuing-land-expropriation/> (accessed 12-09-2019); Ministry of Information and Communication Technology, "Press statement on the resolutions of the second National Land Conference" (6 October 2018) <http://www.mict.gov.na/documents/32978/267068/MEDIA+RELEASE+ON+THE+2ND+LAND+CONFERENCE+%281%29.pdf/a36b3964-127b-4ef3-94d5-f7c31edfdd7d> (accessed 06-02-2019) 3-4; Ministry of Land Reform, "Resolutions of the Second National Conference (October 2018) <http://209.88.21.57/documents/20541/638917/Second+National+Land+Conference+Resolutions+2018.pdf/15b498fd-fdc6-4898-aeda-91fecbc74319> (accessed 15-08-2019) 1.
[382] Ministry of Information and Communication Technology, "Press statement on the resolutions of the second National Land Conference" (6 October 2018) 29.
[383] Ministry of Land Reform, "Resolutions of the Second National Conference (October 2018) 29.

should be expropriated with just compensation;[384] and (b) all underutilised commercial agricultural land, including land belonging to Namibian citizens, is eligible for expropriation.[385] Thirdly, the principle of One-Namibian-One-Farm was agreed upon.[386] In this regard, the farm size per individual should be regulated taking into account the variance of agro-ecological zones, carrying capacity and farm land use.[387] This does not mean that every Namibian will have a farm, but rather that a citizen cannot own more than one farm.

Fourthly, regarding the resettlement policy, scheme and criteria it was suggested that all related legal instruments,[388] should be reviewed, reformed and harmonised for accelerated and successful land redistribution.[389] It was furthermore resolved that pre- and post-resettlement support programmes for farmers would be developed.[390] Also, the needs of target groups under the resettlement programme should be prioritised and taken into account when land acquired for redistribution purposes is made available for resettlement. Different models should be developed to cater for the different needs of the beneficiaries under the resettlement programme.[391]

5 Reflection

5 1 The concept of agricultural land

While a category of agricultural land exists in terms of SALA and the ALA, it does not stipulate what agricultural land is. These Acts only classify agricultural land as a residual category of land. However, not all land classified and falling into this residual category may be suitable for agricultural enterprises or purposes.

The 2016 Land Bill provides some guidance on what agricultural land is. It defines agricultural land according to the purpose for which it is used i.e. agricultural purposes,[392] although it does not provide an extensive list of what agricultural purposes entail.

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[384] Ministry of Land Reform, "Resolutions of the Second National Conference (October 2018) 1-2.
[385] Ministry of Information and Communication Technology, "Press statement on the resolutions of the second National Land Conference" (6 October 2018) 3-4.
[386] 3-4.
[387] 2.
[388] Including ACLRA and the National Resettlement Policy and Scheme.
[389] Ministry of Information and Communication Technology, "Press statement on the resolutions of the second National Land Conference" (6 October 2018) 2-3.
[390] 3-4.
[391] Ministry of Information and Communication Technology, "Press statement on the resolutions of the second National Land Conference" (6 October 2018) 2-3.
[392] Clause 1 of the Land Bill B19-2016.

Accordingly, the Land Bill gives more content to what agricultural land is, as opposed to where it may be situated.

5 2 The regulation of agricultural land

Various regulatory mechanisms may regulate or impact ownership entitlements. As mentioned in Chapter 3, the right to dispose of agricultural land is restricted by the provisions of SALA to ensure that agricultural land is not subdivided into uneconomical parcels of land that may hinder agricultural productivity, and ultimately, food security. While this regulation of agricultural land protects agricultural productivity and food security, it may not promote the redistribution of agricultural land. In this regard, other mechanisms are available that regulate or impact ownership of agricultural land that also promote the redistribution thereof in Namibia.

The restrictions placed on the acquisition of ownership of agricultural land by foreigners in terms of ACLRA indirectly seek to promote the redistribution of agricultural land in Namibia. While the restrictions do not prohibit foreigners from acquiring land outright, it may be cumbersome for foreigners to acquire the consent of the Minister. This means that, the restrictions on foreigners act as a deterrent for “foreign nationals” to acquire agricultural land. In turn, this arguably allows more land to become available for redistribution to Namibian citizens who do not own or otherwise have access to agricultural land or adequate agricultural land.[393]

Where ACLRA only provides for restrictions on the acquisition of agricultural land by foreigners, the new Land Bill places a prohibition on the acquisition of ownership of agricultural land by foreigners. Foreigners will only be allowed to gain access to agricultural land by way of lease. Arguably, this further promotes the redistribution of ownership of agricultural land to Namibian citizens who do not own or otherwise have access to or the use of agricultural land or adequate agricultural land.[394]

Importantly, ACLRA also makes provision for a preferential right of purchase by the State where an owner wishes to dispose of his or her agricultural land. This also places a restriction on all owners and their right to dispose of their property and therefore indirectly regulates the ownership of agricultural land and promotes the redistribution thereof.

[393] See Ministry of Land Reform, *Revised National Resettlement Policy 2018-2027* (March 2017) 8, 16-17.
[394] 8, 16-17.

Accordingly, the Land Bill aims to promote both access to agricultural land for a particular category of persons and to adjust land ownership patterns in Namibia.

5 3 The acquisition of agricultural land

Similar to the South African position,[395] Namibia initially undertook a market-led approach to the acquisition of land for redistributive purposes. While the acquisition of agricultural land is still available by way of market-led approaches in terms of ACLRA, Namibia seems to be moving away from this approach towards the acquisition of agricultural land through expropriation instead.[396] Arguably, this shift towards expropriation as the approach to acquiring agricultural land for redistribution took place following the landmark *Kessl*-judgment.[397] Because, South Africa has not had a similar landmark decision on expropriation, the *Kessl*-judgment provides valuable insights which may be important for South Africa's way forward. The *Kessl*-judgment not only highlighted the importance of following the correct procedure for an expropriation to be valid, but also set out the correct procedure in ACLRA, which facilitates and ensures a transparent expropriation process, in line with the rules of natural justice.[398]

From the outset, and in line with a valid and transparent expropriation process, the procedure requires a uniform and clear approach to determining which agricultural land is suitable for expropriation for redistribution purposes. It is not enough to establish that land or a parcel of land constitutes "agricultural land". Such land does not automatically become suitable for expropriation and available for redistribution. Accordingly, it should be clear why and how agricultural land was identified for expropriation for redistribution purposes specifically.[399] The regulations relating to the criteria for expropriating agricultural land are pivotal in this regard.

6 Conclusion

While Namibia and South Africa have many things in common, including a territorial border and a history of colonialism and race-based minority rule, characterised by extensive land appropriation,[400] these countries differ greatly in population numbers; the amount of arable

[395] See Chapter 5, 2 6.
[396] Pienaar (2018) *Namibian Law Journal* 63.
[397] 63.
[398] Harring & Odendaal (2008) *Land, Environment and Development Project* 13-20.
[399] Pienaar (2018) *Namibian Law Journal* 62.
[400] See generally Amoo *Property Law in Namibia* 13-16, 224-226; Shriver (2006) *Transnational Law and Contemporary Problems* 422-425; Tong (2014) *International Journal of African Renaissance Studies* 17-20;

land available; climate and rainfall patterns.[401] The respective countries' land reform programmes also differ greatly. As mentioned, South Africa undertook an overarching land reform programme consisting of three inter-connected pillars, namely: redistribution, restitution and tenure reform, embedded in section 25 of the Constitution.[402] Conversely, Namibia does not explicitly entrench its land reform programme in the Constitution and focuses on redistribution only, specifically excluding a restitution programme. Notably, in both countries, land reform is difficult, time-consuming and expensive, but necessary.[403] Pienaar furthermore notes that land reform in general has its limitations regarding what it can do and achieve, and that the mechanisms employed to achieve the particular objectives also have limitations.[404]

Despite the differences, and while Namibia faces its own difficulties with its land reform programme, South Africa can learn much from Namibia regarding its redistribution programme in general and its specific mechanisms for defining agricultural land; regulating agricultural land; and acquiring agricultural land for land reform purposes.[405]

Accordingly, there is room for a comparative analysis between Namibia and South Africa. However, as outlined, the aim of this Chapter is not to provide for a comprehensive comparative analysis of redistribution in South Africa and Namibia. Instead, this Chapter lays the foundation for a detailed comparative excursion to be dealt with in Chapter 9 below. In this context, this Chapter set out the legal position regarding (a) the concept of agricultural land in Namibia; (b) the mechanisms for the regulation of agricultural land; and (c) approaches and/or mechanisms for the acquisition of agricultural land in Namibia. The Chapter then concludes with a reflection on these particular matters.

Chapter 9 will provide for a comprehensive and comparative analysis between South Africa, Namibia and India regarding the concept of agricultural land; mechanisms for the regulation of agricultural land; and approaches and/or mechanisms for the acquisition of agricultural

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Mufune (2010) *International Journal of Rural Management* 8-19; Kariuki (2007) *South African Journal of International Affairs* 99-103; Pazcakavambwa & Hungwe "Land redistribution in Zimbabwe" in *Agricultural Land* Redistribution 137; Hall "A comparative analysis of land reform in South Africa and Zimbabwe" in *Unfinished Business: The Land Crisis in Southern Africa* 256.

[401] Pienaar (2018) *Namibian Law Journal* 63.

[402] Pienaar (2018) *Namibian Law Journal* 63. See Chapter 1, 2 1.

[403] Pienaar (2018) *Namibian Law Journal* 63.

[404] 63.

[405] See Chapter 9.

land with the aim of providing some insight and guidance as to the best way forward for the South African redistribution approach specifically.

Chapter 8: India

1 Introduction

India is primarily an agricultural society which, like South Africa, also shares a history of British colonial rule.[1] At independence in 1947,[2] India inherited a semi-feudal legal order and an ineffective agrarian structure characterised by:

> "highly inequitable land ownership, chronic insecurity of tenure among farmers, and low agricultural productivity. A small percentage of wealthy and politically well-connected individuals, owned most of the country's agricultural land, leaving…[most] of the rural population landless or nearly landless".[3]

Importantly, land is not only used for the production of food or a source of livelihood, but also a "symbol of social identity, status, power and wealth".[4] Accordingly, India draws a strong linkage between access to land and ownership of land on the one hand, and the social status of an individual and/or his or her family, on the other.[5] In this regard, similar to the post-apartheid South African legal order, the new Indian order aimed to guarantee rights of freedom, equality and property while also redressing the inequalities in wealth and distribution of resources through social and economic transformation.[6]

The Constitution of India, which was adopted by the Constituent Assembly on 26 November 1949, and which came into force on 26 January 1950, specifically provides that India is a "sovereign, socialist, secular democratic republic".[7] The Republic of India, governed by the Constitution, provides for a parliamentary form of government which is federal in structure.[8]

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[1] T Hanstad, R Nielsen, D Vhugen & T Haque "Learning from old and new approaches to land reform in India" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 242-243.
[2] 15 August 1947.
[3] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 242-243; M Sethi "Land reform in India: Issues and challenges" in P Rosset, R Patel & M Courville (eds) *Promised Land: Competing Visions of Agrarian Reform* (2006) 73-92 73; PS Appu *Land Reforms in India: A Survey of Policy, Legislation and Implementation* (1996) xviii.
[4] V Bhgat-Ganguly "Special issue on land acquisition, rehabilitation and resettlement in India" (2016) 4 *Journal of Land and Rural Studies* 1-2, 1.
[5] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 2.
[6] See in general J Murphy "Insulating land reform from constitutional impugnment: An Indian case study" (1992) 25 *Comparative and International Law Journal of Southern Africa* 129-155; A Jain "Constitutional battles and the right to property in India" (2014) 3 *Journal of Civil and Legal Services* 1-4; J Singh "Separation of powers and the erosion of the 'right to property' in India" (2006) 17 *Constitutional Political Economy* 303-324.
[7] Preamble of the Constitution of India, 1950.
[8] Article 1 of the Constitution of India, 1950 provides for a "Union of states".

The Constitution provides for two levels of government: (a) a Union or Central government[9] and (b) 29[10] individual State governments.[11] Further, the Seventh Schedule of the Indian Constitution, elaborated on in more detail below, provides for a Union, State and concurrent list, which sets out a list of subjects over which the Union or State governments have exclusive or concurrent legislative jurisdiction.

The Constitution also embodies a Bill of Rights, which provides for various fundamental rights that enjoy protection in the Republic of India as a whole. The protection of existing property rights,[12] which entrenched the unequal distribution of existing property entitlements at the time of independence, and the aim of achieving a more egalitarian society through the redistribution of land, resulted in intense debate in the Constituent Assembly.[13] These debates, similar to those held in the South African Assembly before adopting the Constitution,[14] led to a compromise between competing interests.[15] The compromise resulted in the right to property being recognised as a fundamental right in the Constitution of India.[16] Initially, the property clause consisted of two parts, namely: Article 19(1)(f) and article 31 of the Constitution of India, adopted in 1950.[17] Article 19(1)(f), found under the right to freedom, held that:

> "All citizens shall have the right to acquire, hold and dispose of property".[18]

[9] Part 5 of the Constitution of India, 1950 read with the Union List in the Seventh Schedule, which provides for various subjects in terms of which only the Union or Central government can legislate.
[10] The First Schedule of the Constitution of India, 1950 provides for a list of all the States and their territories. The Republic of India has 29 States: Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Nagaland, Orissa, Punjab, Rajasthan, Sikkim, Tamil Nadu, Telangana, Tripura, Uttarakhand, Uttar Pradesh and West Bengal.
[11] Part 6 of the Constitution of India, 1950 read with the State List in the Seventh Schedule which provides for various subjects in terms of which only the individual State governments can legislate.
[12] Articles 19(1)(f) and 31 of the Constitution of India, 1950 before it was repealed by the 44th amendment in 1978.
[13] AJ van der Walt *Constitutional Property Clauses* (1999) 193. See further, Murphy (1992) *Comparative and International Law Journal of Southern Africa* 129-155; Jain (2014) *Journal of Civil and Legal Services* 1-4; Singh (2006) *Constitutional Political Economy* 303-324.
[14] See Chapter 1, 2 1 above.
[15] Van der Walt *Constitutional Property Clauses* 193.
[16] Article 19(1)(f) of the Constitution of India, 1950; Van der Walt *Constitutional Property Clauses* 193, 203. See in general Murphy (1992) *Comparative and International Law Journal of Southern Africa* 129-155; Jain (2014) *Journal of Civil and Legal Services* 1-4; Singh (2006) *Constitutional Political Economy* 303-324.
[17] Van der Walt *Constitutional Property Clauses* 192.
[18] Article 19(1)(f) was removed by the Constitution (Forty Fourth Amendment) Act 1978.

Article 19(5) allowed for reasonable restrictions on the right to acquire, hold and dispose of property: [19]

> "Nothing in sub clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent[s] the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

Furthermore, article 31(1), which provided for the right to property,[20] and which is similar to section 25(1) of the South African Constitution, provided that:

> "No person shall be deprived of his property save by authority of law".

Article 31(2), dealing with expropriation, which originally provided that property may not be disposed of or acquired for public purposes unless the law in question provides for compensation[21] was amended and replaced multiple times[22] and finally repealed in 1978.[23]

The inherent tension between guaranteeing the right to property on the one hand, while also endeavouring to achieve social and economic reform through land reform and State-planned industrial growth on the other hand,[24] resulted in tensions between the legislature and executive, which sought to implement its development agenda, and the judiciary, which enforced the fundamental right to property of those affected by the reforms.[25] In short, the judicial enforcement of the property clause often led indirectly[26] to the invalidation of a number of laws aimed at social and economic reform, including land reform legislation.[27]

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[19] Van der Walt *Constitutional Property Clauses* 192.
[20] The sub-heading "Right to Property" was omitted by the Constitution (Forty-fourth Amendment) Act, 1978.
[21] Van der Walt *Constitutional Property Clauses* 192.
[22] Article 31(2) of the Constitution of India, 1950 was replaced by the Constitution (Fourth Amendment) Act 1955. It was replaced again by the Constitution (Twenty Fifth Amendment) Act 1971 and repealed in 1978 by the Constitution (Forty-fourth Amendment) Act.
[23] The Constitution (Forty-fourth Amendment) Act, 1978.
[24] Van der Walt *Constitutional Property Clauses* 193, 205.
[25] 193, 205.
[26] Van der Walt *Constitutional Property Clauses* 195 notes that the courts "struck down the laws in question but did not justify their decisions with reference to the property guarantee as such, preferring to base their decisions on either the equality clause in article 14 or the reasonableness provision in article 19 [of the Constitution of India, 1950]".
[27] For example, in *Kameshwar Singh v The Province of Bihar* AIR (37) 1950 Pat 392 (SB), the Bihar State Management of Estates and Tenure Act 21 of 1949 (which was aimed at abolishing the *Zamindari* system) was struck down by the Patna High Court for being *ultra vires* because it provided for unreasonable and unlawful restrictions on property rights and was in conflict with the property guarantee in the Constitution. The court in *Kameshwar Singh and Others v The State of Bihar* AIR (38) 1951 Pat 91 (FB) struck down a similar law, the Bihar Land Reforms Act 30 of 1950, which provided for the acquisition by the State of land held by the *zamindars*. This case was later reconsidered on appeal, after article 31 was amended to preclude the application of article 14 to land reform laws.

However, the legislature responded to each decision by the judiciary by amending the Constitution.[28]

Ultimately the 44th constitutional amendment in 1978 repealed the property clause (articles 19(1)(f) and 31) from the chapter on fundamental rights in the Constitution.[29] Article 300A was inserted separately in the Constitution in part 12, titled "finance, property, contracts and suits", which merely provides that:

> "No person shall be deprived of his property save by authority of law".

Accordingly, article 300A creates a constitutional rather than a fundamental right.[30] There are a number of implications that flow from the status of the right to property as a constitutional right. For one, it weakens the protection of the right in question. The right to property as a constitutional right "guarantees nothing more than the assurance that deprivations of property shall not be effected, simply by administrative decree".[31] At the very least this means that any limitation on property rights has to be imposed by a law of general application, within the legislative power of each individual State legislature.[32] Such regulatory provisions imposing limitations on the right to property "should also not violate fundamental rights or other constitutional restrictions".[33] An analogy, as an example, can be drawn with the South African property clause. If for example, the right to property was removed from the Bill of Rights in the South African Constitution, it would weaken the protection afforded to the right. Any interference with the right to property would not have to be justified in terms of the limitation (section 36 of the Constitution) clause on the grounds of reasonableness or proportionality. The only requirement would be for the interference to occur in terms of legislation and that the legislation in question does not infringe upon fundamental rights. Secondly, the avenue for legal redress and thirdly, the corresponding

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[28] For example, the constitutional assembly introduced the Constitution (First Amendment) Act 1951, which inserted articles 31A and 31B into the property clause, while appeal proceedings were still pending in *Kameshwar Singh and Others v The State of Bihar* AIR (38) 1951 Pat 91 (FB). Van der Walt *Constitutional Property Clauses* 195 notes that Article 31B in particular "ousted judicial review of all land reform measures listed in the Ninth Schedule to the Constitution". This was confirmed on appeal in *State of Bihar v Kameshwar Singh* AIR (39) 1952 SC 252 where the Supreme Court conceded that the Bihar land reform legislation was protected from judicial scrutiny following the introduction of Articles 31A and 31B of the Constitution. Other constitutional amendments include: The Fourth (1955); Seventh (1964); Seventeenth (1964); Twenty-Fourth (1971); Twenty-Fifth (1972); Twenty-Sixth (1972); Twenty-Ninth (1972); Thirty-Fourth (1974); and the Thirty-Ninth (1975) constitutional amendments.
[29] Van der Walt *Constitutional Property Clauses* 192.
[30] 203, 213, 215-216.
[31] 203, 213, 215-216.
[32] 203.
[33] 213.

remedy available to the person whose right to property has been interfered with, will be different. If the right is a fundamental right the affected person may approach the Supreme Court of India,[34] as opposed to the lower courts.[35] The remedies afforded to the affected person may also differ in this regard.[36] Compared to the South African position where reasonableness and proportionality play a role in the protection of property rights and interests where a land reform measure imposes a restriction on the right to property,[37] the status of the right to property in India allows the executive and legislature to implement land reforms even if private property rights and interests are adversely affected.[38] Accordingly, having a right to property embedded in the Bill of Rights specifically, as opposed to any other part of the Constitution, has very specific implications.

Furthermore, unlike the South Africa Constitution,[39] the Republic of India does not entrench or outline its land reform programme in the Constitution. There is also no overarching national legislation dealing with land reform measures. Instead, the Constitution of India provides for guiding principles known as the Directive Principles of State Policy in Part 4 of the Constitution which is applicable to the Union government and all State governments.[40] Amongst other principles, it provides specifically for the securement of a social order for the promotion of welfare of all people:

> "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations". [41]

Redressing the skewed land ownership patterns through land reform is one way to uphold this directive. Therefore, both South Africa and India seek to achieve social justice through the redistribution of resources, including land.[42]

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[34] Article 32 of the Constitution of India, 1950.
[35] Article 226 of the Constitution of India, 1950.
[36] Article 32 of the Constitution of India, 1950.
[37] See Chapter 4 in general.
[38] Van der Walt *Constitutional Property Clauses* 205.
[39] Sections 25(4) -25(8) of the Constitution of the Republic of South Africa, 1996.
[40] Part IV of the Constitution of India, 1950.
[41] Article 38 of the Constitution of India, 1950.
[42] Murphy (1992) *Comparative and International Law Journal of Southern Africa* 129.

Importantly, land reform under the Indian Constitution is a State subject, listed in the State list in the seventh schedule of the Constitution.[43] The Constitution of India provides explicitly that individual States have exclusive legislative power over:

> "Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."[44]

In other words, the legislature of each State government has the exclusive power to promulgate land reform legislation. The implementation is also the exclusive responsibility of each State government.[45] In the decades following India's independence, a significant body of land reform legislation was passed, dealing with, *inter alia*: (a) abolishing intermediate interests in land, (b) tenancy reform, (c) imposing land ceilings and redistributing the above-ceiling/surplus land; and (d) distributing government wasteland to those without agricultural land.[46]

While India is an important comparative case study for land reform in general,[47] it is their experience with land ceiling regulation, primarily aimed at redistributing surplus land to the poor, landless and marginal farmers,[48] that is specifically relevant for purposes of this dissertation. Similar to the envisaged South African framework,[49] land ceiling legislation adopted and implemented by all the States in India placed limitations (or ceilings) on the amount of agricultural land a person or family could own.[50] While basic points of departure are similar, important differences exist, for example, variations on several key aspects,

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[43] Appu *Land Reforms in India* xviii.
[44] See entry 18 in the State List in the Seventh Schedule of the Constitution of India, 1950.
[45] Appu *Land Reforms in India* xviii.
[46] RS Deshpande "Current land policy issues in India" (2003) *Land Settlement and Cooperatives: Special Edition* 1-14, 1 <http://www.fao.org/3/y5026e/y5026e0b.htm#bm11> (accessed 16-04-2019); Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 242; T Besley & R Burgress "Land reform, poverty reduction and growth: Evidence from India" (2000) 115 *The Quarterly Journal of Economics* 389-430.
[47] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 13.
[48] Appu *Land Reforms in India* 17; Besley & Burgress (2000) *The Quarterly Journal of Economics* 389-430.
[49] See Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013); the Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.
[50] NC Behuria *Land Reforms Legislation in India: A Comparative Study* (1997) 166-183; Appu *Land Reforms in India* 140, 144.

including the specifics of the ceiling limits, compensation for above-ceiling land expropriation and defining, and prioritising beneficiaries.[51]

Apart from a few exceptions, it is evident that the land ceiling legislation in India has not lived up to expectations,[52] as elaborated on in detail below.[53] The imposition of ceilings has generally not led to any effective redistribution of agricultural land, but instead, aggravated India's existing problem of uneconomical fragmentised land holdings, which has led to a general decline in agricultural productivity.[54] Accordingly, the insights drawn from the experience of some States in India where land ceiling legislation was implemented successfully, will be important for establishing a clearly formulated legal and institutional framework for envisaged land ceilings in South Africa.

Despite the general ineffective and unsuccessful use of land ceilings in redistributing agricultural land, the policy was applied with some degree of success.[55] Given that India is a federal state with 29 States each with their own legislation regulating agricultural land ceilings,[56] it is not within the scope of this dissertation to discuss every State's land ceiling

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[51] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248; PS Appu *Land Reforms in India: A Survey of Policy, Legislation and Implementation* (1996); CD Deecre & M Leon *Empowering Women* (2001); G Gopal "Gender and economic inequality in India: The legal connection" (1993) 13 *Boston College Third World Law Journal* 63-86 for an exposition of key aspects focused on in India. The identified beneficiaries are seemingly women and the poor. See further Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017, where the focus is not only on the poor. The Bill identifies black people as beneficiaries of agricultural land. Accordingly, why both India and South Africa's ceilings legislation and policies focus on the redistribution of agricultural land for the poor, the South African perspective differs because the redistribution of agricultural land is also linked to race.

[52] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.
See also Acharya "The Indian Urban Land Ceiling Act: A critique of the 1976 Legislation" <http://documents.worldbank.org/curated/en/631451468750264120/pdf/multi-page.pdf> (accessed 28-05-2017) 39-51.

[53] See 3 3 below.

[54] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.

[55] According to, T Hanstad & J Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development, Report No 112,* 1-66 4, West Bengal comprises only 3.3% of the land in India, but it is responsible for 20% of the redistribution of surplus-ceiling land.

[56] See the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; the Gujarat Agricultural Lands Ceiling Act 27 of 1961; the Haryana Ceiling on Landholding Act 26 of 1972; the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; the Karnataka Land Reforms Act 10 of 1962; the Kerala Land Reforms Act 1 of 1964; the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; the Orissa Land Reforms Act 16 of 1960; the Punjab Land Reforms Act 10 of 1973; the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and the West Bengal Land Reforms Act 10 of 1965.

measures. In this regard, the 2013 *APLF*[57] identifies West Bengal of particular importance for the South African position in relation to the formulation and implementation of proposed ceilings legislation.[58] Accordingly, the focus will fall on the experience in West Bengal, which has been identified as one of the States[59] that was most effective with its formulation and implementation of land ceilings and redistribution of agricultural land.[60]

Similar to the previous Chapter, the aim of this Chapter is not to provide for an in-depth analysis of the land reform programmes conducted in South Africa and India. Instead, for purposes of the Chapter, the legal position regarding (a) the concept of agricultural land in India; (b) mechanisms for the regulation of agricultural land for land reform purposes, specifically land ceilings; and (c) approaches and/or mechanisms for the acquisition of agricultural land in India are explored. The Chapter then concludes with a reflection on these three matters. Later in the study, Chapter 9 will provide for a comparative analysis between South Africa, Namibia and India regarding the concept of agricultural land; mechanisms for the regulation of agricultural land; and approaches for the acquisition of agricultural land. This Chapter is thus essential in laying the foundational basis for an in-depth legal comparative analysis to follow.

2 The concept of agricultural land in India

2 1 Introduction

The importance of having access to land, including agricultural land,[61] to address the skewed "inequalities in relation to agricultural land ownership and land use",[62] in India cannot

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[57] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013).
[58] See Chapter 3, 3 3 2 above.
[59] The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5 identifies West Bengal, Kerala and Jammu & Kashmir as achieving some measure of success with the implementation of its land ceiling policy, although the policy does not set out the basis for determining the success of the individual States; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247.
[60] See Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 4. See further D Bandyopadhyay "Land reforms and agriculture: The West Bengal experience" (2003) 38 *Economic & Political Weekly* 879-884; R Ghosh & K Nararai "Land reforms in West Bengal" (1978) 6 *Social Scientist* 50-67; A Sarkar "Development and displacement: Land acquisition in West Bengal" (2007) 42 *Economic & Political Weekly* 1435-1442 and V Rawal "Ownership holdings of land in rural India: Putting the record straight" (2008) 43 *Economic & Politcal Weekly* 43-47.
[61] Hanstad *et al* "Learning from old and new approaches to land reform in India" *Agricultural Land Redistribution: Toward Greater Consensus* 242-243.
[62] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 1. See also Kloppers & Pienaar (2014) *PELJ* Abstract (my emphasis). See also

be overstated. The *Draft National Land Reforms Policy* published in 2013, reiterates this point:

> "Land, [particularly agricultural land], is the most valuable, imperishable possession from which people derive their economic independence, social status and a modest and permanent means of livelihood. But in addition to that, land also assures them of identity and dignity and creates condition [*sic*] and opportunities for realizing social equality."[63]

Accordingly, to implement land reform measures in this context it is necessary to first establish what constitutes agricultural land in India. For purposes of land reform in general, varied concepts of agricultural land can be found in national policy and legislation and in State-specific legislation respectively. Accordingly, in determining the concept of agricultural land in India, a distinction may be drawn between national policy and legislation applicable to all States[64] and State-specific legislation.

2 2 The concept of agricultural land in national policy and legislation

In light of the increasing industrialisation and commercialisation of the farming (and agricultural) industry[65] in India, the *National Rehabilitation and Resettlement Policy* ("*NRR Policy*"), 2007[66] aims to minimize the impact of State acquisitions of agricultural land for purposes of *inter alia* industrialisation on displaced persons and vulnerable citizens.[67] The *NRR Policy* provides for a seemingly wide definition of agricultural land. The *NRR Policy* provides for a list of categories of land which are deemed to be agricultural land. It specifically provides that agricultural land includes:

> "lands being used for the purpose of (i) agriculture or horticulture; (ii) dairy and poultry farming, pisciculture, breeding of livestock or nursery growing medicinal herbs; (iii) raising of crops, grass

Tsawu *An historical overview and evaluation of the sustainability of the LRAD programme in SA* 1-2 and Pienaar *Land Reform* 375.

[63] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 1.

[64] With the exception of section 1(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013 which provides that the Act extends to the whole of India except the States of Jammu & Kashmir.

[65] Sethi "Land Reform in India: Issues and Challenges" in *Promised Land Competing Visions of Agrarian Reform* 73-92.

[66] Government of India, Ministry of Rural Development, Department of Land Resource *The National Rehabilitation and Resettlement Policy*, 2007 (31 October 2007).

[67] Preamble of the Government of India, Ministry of Rural Development, Department of Land Resource *The National Rehabilitation and Resettlement Policy*, 2007 (31 October 2007).

> or garden produce; and (iv) land used by an agriculturist for grazing of cattle, but does not include land used for cutting wood only".[68]

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013,[69] ("RFTLARRA") which gives effect to the *NRR Policy*, provides for a similar definition of agricultural land. At first glance it provides for a closed list of land tracts which are deemed to be agricultural land.[70] The RFTLARRA provides that agricultural land means:

> "land used for the purpose of (i) agriculture or horticulture; (ii) dairy and poultry farming; pisciculture; sericulture; seed farming; breeding of livestock or nurseries growing medicinal herbs; (iii) raising of crops, trees, grass or garden produce; and (iv) land used for cattle grazing".[71]

It is questionable whether a closed list of land constituting agricultural land, as opposed to an open list provided for in the *NRR Policy*, is sensible, given that the climatic conditions and types of land differ from State to State. On the one hand, persons who own or hold land that do not fall under the definition of "agricultural land" under the RFTLARRA, may become displaced through State acquisitions and not qualify as beneficiaries ("affected families")[72] in need of rehabilitation and resettlement under the Act.[73] On the other hand, the rationale of the Act may be to limit the number of persons in need of rehabilitation and resettlement under the Act, by limiting the application of the Act to specified types of land only.

Despite the provision of a seemingly closed list of land constituting agricultural land under the RFTLARRA, the concept of agricultural land can still be construed widely. The

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[68] Section 3(e) of the Government of India, Ministry of Rural Development, Department of Land Resource *The National Rehabilitation and Resettlement Policy* (31 October 2007).

[69] See further section 4 of Chapter 8 below. Similarly to the National Rehabilitation and Resettlement Policy, 2007, the Act aims to provide for *inter alia* (a) a humane, participative, informed and transparent process for land acquisition for industrialisation, development of essential infrastructural facilities and urbanisation with the least disturbance to the owners of the land and other affected families; (b) to provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition; (c) make adequate provisions for such affected persons for their rehabilitation and resettlement and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post-acquisition social and economic status.

[70] Section 3(d) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.

[71] Section 3(d) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013. Pisciculture, known as fish farming, involves raising fish commercially in tanks or enclosures such as fish ponds, usually for food. Sericulture involves the production of silk and the rearing of silkworms for this purpose.

[72] See section 3(c) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.

[73] Chapter 5 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.

RFRLARRA provides that it is land used for the purpose of *agriculture.*[74] While "agriculture" is not defined in the RFTLARRA it is defined in various pieces of State ceiling legislation.[75] If the concept of "agriculture", as defined by individual States, is read into the RFTLARR then the Act applies to a wider selection of land than that provided for in the closed list of land constituting agricultural land in the RFTLARRA. Accordingly, if the definition of agricultural land in individual State ceiling legislation, if read into the concept of agricultural land in the RFTLARRA, then the concept of agricultural land is wide enough to ensure protection to potential displaced persons.

2 3 The concept of agricultural land in ceiling legislation

There is no national legislation applicable to all Indian States dealing with agricultural land ceilings.[76] Instead, all Indian States regulate the imposition of land ceilings individually.[77] Despite the varied agricultural production and climatic conditions across the country, there seems to be some similarities between the various States' concept of agricultural land in its respective ceiling legislation. Most States provide for a definition of "land" and/or "agriculture", with the exception of the Indian States of Kerala and Uttar Pradesh, which provide for specific types of land in the definitions list.[78]

Generally, the concept of agricultural land is formulated in one of two ways in the States' respective land ceilings legislation. "Land" is either defined as land held, used or capable of being used for (a) "agricultural purposes",[79] followed by a list of uses that may be deemed

[74] Section 3(d)(i) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[75] Section 3(j) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 2(f) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 2(3) of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978.
[76] Entry 18 in the State List in the Seventh Schedule of the Constitution of India, 1950. See also Appu *Land Reforms in India* xviii.
[77] See the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; the Gujarat Agricultural Lands Ceiling Act 27 of 1961; the Haryana Ceiling on Landholding Act 26 of 1972; the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; the Karnataka Land Reforms Act 10 of 1962; the Kerala Land Reforms Act 1 of 1964; the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; the Orissa Land Reforms Act 16 of 1960; the Punjab Land Reforms Act 10 of 1973; the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978 the West Bengal Land Reforms Act 10 of 1965.
[78] See sections 2(10); 2(11); 2(24); 2(38) and 2 (41) of the Kerala Land Reforms Act 1 of 1964 and sections 3(8) and 3(11) of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978.
[79] Section 3(f) of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 2(10) of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 3(g) of the Haryana Ceiling on Landholding Act 26 of 1972; section 3(f) of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 2(9) of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; Section 2(18) of the Karnataka Land Reforms Act 10 of 1962; section 2(k) of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 2(14) of the Orissa

agricultural purposes, or for (b) purposes of "agriculture"[80] in that specific State. Most States, regardless of the formation used, also provide for a separate definition of "agriculture" in its specific ceiling legislation.[81]

In light of the varied agricultural production and climatic conditions across the country,[82] it is not surprising that there is no comprehensive or generally accepted definition of agricultural land in land ceilings legislation of individual States. Each State, depending on the types of lands (for example, forest, pastures and grazing, crops lands) specific to that State or region may have a different definition of agricultural land for the purposes of ceiling legislation. It may even exempt some types of lands from the legislation to promote agricultural productivity by ensuring that the land is not fragmented into smaller parcels through the imposition of a ceiling limit.

2 4 The concept of agricultural land in West Bengal

As mentioned above, it is not possible to discuss the concept of agricultural land in every State. Instead, the focus falls on the State of West Bengal, because it is regarded as one of the States where land ceilings were implemented most effectively.[83] Two respective Acts in West Bengal provide for a concept of agricultural land.[84]

The West Bengal Estates Acquisition Act 1 of 1954, with the aim of effecting land reform through the abolition of intermediaries,[85] provides for the State acquisition of estates, of

Land Reforms Act 16 of 1960; section 3(5) of the Punjab Land Reforms Act 10 of 1973; section 3(22) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961.

[80] Section 3(j) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 2(f) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 2(3) of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978.

[81] Section 3(a) of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 2(1) of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 2(1) of the Karnataka Land Reforms Act 10 of 1962; section 2(1) of the Orissa Land Reforms Act 16 of 1960; section 2(b) of the Rajasthan Imposition of Ceiling on Agricultural Holding Act 11 of 1973; section 3(1) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961.

[82] K Krishna Kumar, K Rupa Kumar, RG Ashrit, NR Deshpande & JW Hansen "Climate impacts on Indian agriculture" (2004) 124 *International Journal of Climatology* 1375-1393; KS Kavi Kumar & J Parikh "Indian agriculture and climate sensitivity" (2001) 11 *Global Environmental Change* 147-154; S Kumar, T Ramilan, CA Ramarao, Ch. S Rao & A Whitbread "Farm level harvesting across different agro climatic regions of India" Assessing performance and its determinants" (2016) 176 *Agricultural Water Management* 55-66.

[83] See Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 4. See further D Bandyopadhyay "Land reforms and agriculture: The West Bengal experience" (2003) 38 *Economic & Political Weekly* 879-884; R Ghosh & K Nararai "Land reforms in West Bengal" (1978) 6 *Social Scientist* 50-67; A Sarkar "Development and displacement: Land acquisition in West Bengal" (2007) 42 *Economic & Political Weekly* 1435-1442 and V Rawal "Ownership holdings of land in rural India: Putting the record straight" (2008) 43 *Economic & Politcal Weekly* 43-47.

[84] The West Bengal Estates Acquisition Act 1 of 1954 and the West Bengal Land Reforms Act 10 of 1956.

[85] See Preamble of the West Bengal Estates Acquisition Act 1 of 1954.

rights of intermediaries therein and of certain rights of land owners or land holders (referred to as "*raiyats*" and "under-*raiyats*" respectively).[86] This piece of legislation specifically draws a distinction between "agricultural land"[87] and "non-agricultural land".[88] Agricultural land is defined as:

> "[L]and ordinarily used for purposes of agriculture or horticulture and includes such land, notwithstanding that it may be lying fallow for the time being".[89]

Non-agricultural land is defined as a residual category, i.e., lands other than agricultural land or other than land comprised in a forest.[90]

Interestingly, the ceilings legislation in West Bengal, namely the West Bengal Land Reforms Act 10 of 1956 ("WBLRA"), does not provide for a definition of agricultural land *per se*. Instead, ceilings are applicable to "land" which is defined as "land of every description."[91] It also includes a list of land of every description. Accordingly, the operation of the ceilings legislation includes land used for:

> "tank, tank-fisheries, fishery, homestead, or land used for the purpose of livestock breeding, dairy or poultry farming, land comprised in a tea garden, mill, factory, workshop, orchard, *hat*, *buzar*, ferries, tolls or land having any other *sairati* interests and any other land together with its interest; benefits arising out of land and things attached to the earth or permanently fastened to anything attached to earth."[92]

The applicability of the ceilings legislation in relation to the concept of "land" and not specifically "agricultural land", is averred as one of the reasons for the success of the implementation of land ceilings in West Bengal. [93] While not in conformity with the other States' concepts of agricultural land, this wide definition of land encompassing agricultural

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[86] Furthermore, section 1(10) of the West Bengal Land Reforms Act 10 of 1956 defines a *raiyat* as a person or an institution holding land for any purposes whatsoever.
[87] Section 2(b) of the West Bengal Estates Acquisition Act 1 of 1954.
[88] Section 2(j) of the West Bengal Estates Acquisition Act 1 of 1954.
[89] Section 2(b) of the West Bengal Estates Acquisition Act 1 of 1954.
[90] Section 2(j) of the West Bengal Estates Acquisition Act 1 of 1954.
[91] Section 2(7) of the West Bengal Land Reforms Act 10 of 1956.
[92] Section 2(7) of the West Bengal Land Reforms Act 10 of 1956. Although not defined in the Act, section 1(12) of the East Bengal State Acquisition and Tenancy Act 18 of 1951 provides that a "*hat*" or "*buzar*" refers to "any place where persons assemble daily or on particular days in a week primarily for the purposes of buying or selling agricultural or horticultural produce, livestock, poultry, hides, skins, meat, fish, eggs, milk, milk products or any other articles of food or drink or other necessaries of life, and includes all shops of such articles or manufactured articles within such place".
[93] Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 65.

land, ensures that more land is available to impose ceilings on, which in turn makes more land available for redistribution.[94] The imposition of land ceilings is discussed in the next section.

3 Mechanisms for the regulation of agricultural land in India

3 1 Introduction

The distinguishing features of the Indian agrarian economy at independence, included great inequality of land ownership; absentee landlords; a high incidence of tenancy and an array of uneconomic, fragmented and subdivided agricultural landholdings.[95] Importantly, rights in land, including ownership, were used to determine social status and economic opportunity for different groups in the rural population.[96] Accordingly, after independence, it was proposed that a progressive agrarian economy requires a reduction in the disparities of ownership of agricultural land in India.[97]

These objectives of land reform in India, as set out in the Second Five Year Plan (1956-1961),[98] were twofold. Firstly, impediments on agricultural production that arose from the agrarian structure under British colonial rule had to be removed.[99] Secondly, land reform aimed to create conditions for evolving "an agrarian economy with high levels of efficiency and productivity"[100] timeously. Accordingly, the emphasis was on increased agricultural production.[101] Despite these objectives, the Second Five Year Plan recommended that:

> "…steps should be taken in each State to impose a ceiling on existing agricultural landholdings. The ceilings would apply to owned land (including land under permanent and heritable rights) held under personal cultivation, the tenants being enabled to acquire rights of ownership…".[102]

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[94] Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 65.
[95] Appu *Land Reforms in India* 188.
[96] Government of India, Planning Commission *The Second Five Year Plan* (1956) 178.
[97] Government of India, Planning Commission *The Second Five Year Plan* (1956) 178; Appu *Land Reforms in India* 188.
[98] The First Five Year Plan (1951-1956) did not propose the agricultural land ceilings. Land ceilings were first introduced in the Second Five Year Plan (1956-1961).
[99] Government of India, Planning Commission *The Second Five Year Plan* (1956) 178; Appu *Land Reforms in India* 139.
[100] Government of India, Planning Commission *The Second Five Year Plan* (1956) 178; Appu *Land Reforms in India* 139.
[101] Appu *Land Reforms in India* 139.
[102] Government of India, Planning Commission *The Second Five Year Plan* (1956) 178; Appu *Land Reforms in India* 194; Appu *Land Reforms in India* 141.

While the aim of the imposition of land ceilings is to reduce the disparities in ownership of agricultural land and wealth, by redistributing land above the imposed ceiling to the poor, landless and marginal farmers,[103] it was not recognised as a mechanism that would promote or increase agricultural production.[104] Accordingly, the mechanism was justified because it was postulated that it would "promote social justice and provide a congenial environment for the development of a co-operative rural economy".[105] Additionally, Appu notes that given the already fragmented agricultural landholdings, there was no risk in fragmenting large farms when land ceilings were imposed.[106] The following section discusses ceilings on agricultural landholdings as a measure to regulate agricultural land for land reform purposes.

3 2 Ceilings on agricultural landholdings

A land ceiling is a regulatory land reform mechanism that imposes a restriction on the amount of (agricultural) land a person may own. Any land above the ceiling becomes classified as ceiling-surplus land, which may be redistributed to beneficiaries under the State's land reform policy.[107] Ceiling laws were enacted in three phases.[108] The first phase covered the period 1956 to 1972, before the national guidelines were laid down. The second phase, took place after the adoption of national guidelines in 1972. The final phase, still in progress, after the adoption of the *Draft National Land Reforms Policy*[109] ("*2013 Draft Policy*") provided for some measure of uniformity in the land ceiling legislation in general.

By 1961, all Indian States adopted agricultural land ceiling legislation.[110] States were given the authority, in light of the local conditions, to determine *inter alia* (a) the unit of application

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[103] Appu *Land Reforms in India* 22, 139; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246. See also Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 13.

[104] Appu *Land Reforms in India* 139. See in general M Ghatak & S Roy "Land Reform and agricultural productivity: A review of the evidence" (2007) 23 *Oxford Review of Economic Policy* 251-269 where the authors find that land reform legislation, in particular land ceiling legislation, has and still has a negative impact on agricultural productivity.

[105] Government of India, Planning Commission *The Second Five Year Plan* (1956) 178; Appu *Land Reforms in India* 139.

[106] Appu *Land Reforms in India* 188. In principle, this means that there are few large farms or large-scale farming enterprises in India.

[107] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) in general.

[108] Behuria *Land Reform Legislations in India* 131.

[109] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013).

[110] Appu *Land Reforms in India* 143. See also K Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11 January 2019). See the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1

of the ceiling;[111] (b) the classification of land; (c) exemptions from the ceilings legislation; (d) the ceiling limit; (e) payment of compensation for ceiling-surplus land; and (f) who the beneficiaries should be and what type of land rights are granted to them once they have acquired the ceiling-surplus land.[112] This inevitably resulted in wide variations between the laws of different States.[113] The extent of the availability of ceiling-surplus land largely depended on the definitions adopted by the individual States for "family";[114] ceiling area and exemptions.[115] Furthermore, "the legislative measures in the first phase were full of loopholes which were taken advantage of by the big landowners to circumvent the law".[116] For example, in anticipation of the promulgation of ceiling legislation, land owners resorted to reclassifying their land to fall outside the scope of the land ceiling legislation; partitions and fictitious transfers in *benami*[117] names on a very large scale.

To bring about some measure of uniformity in land ceilings legislation and to address the loopholes in the legislation, a new policy was evolved in 1971, aimed at *inter alia* lowering ceilings; fixing the unit of application as a family unit or holding and reducing the number of

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of 1973; the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; the Gujarat Agricultural Lands Ceiling Act 27 of 1961; the Haryana Ceiling on Landholding Act 26 of 1972; the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; the Karnataka Land Reforms Act 10 of 1962; the Kerala Land Reforms Act 1 of 1964; the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; the Orissa Land Reforms Act 16 of 1960; the Punjab Land Reforms Act 10 of 1973; the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and the West Bengal Land Reforms Act 10 of 1965.

[111] The ceiling may be applicable to an individual or a family as a unit.

[112] Appu *Land Reforms in India* 188; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.

[113] Appu *Land Reforms in India* 145.

[114] See section 3(f) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 3(d) the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 2(ee) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 2(16) read with section 6(2) of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 3(f) of the Haryana Ceiling on Landholding Act 26 of 1972; section 3(f) of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 2(6) of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; section 2(12) read with section 2(17) of the Karnataka Land Reforms Act 10 of 1962; section 2(14) of the Kerala Land Reforms Act 1 of 1964; section 2(gg) of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 37(b) of the Orissa Land Reforms Act 16 of 1960; section 3(4) of the Punjab Land Reforms Act 10 of 1973; section 2(f) of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; section 2(i) of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; section 3(14) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; section 3(7) of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and section 14K(c) of the West Bengal Land Reforms Act 10 of 1965 for the different definitions of "family" under the different States' ceiling legislation.

[115] Behuria *Land Reforms Legislation in India* 132.

[116] C Ashokvardhan *Ceiling Laws in India* (2005) 15.

[117] *Benami* is essentially an Indian origin word which means holding in someone else's or a fictitious name to cover up the identity of the beneficial owner. See 3 3 below for a discussion of *benami* transactions.

exemptions.[118] In this regard, national guidelines were issued in 1972[119] ("1972-guidelines"). The impact of the land reform process in general was re-assessed decades later, which resulted in the publication of the *2013 Draft Policy*.[120] The aim of the guidelines and policy is to make more land available for redistribution at a faster pace,[121] given the slow and unsuccessful redistribution process flowing from the land ceiling measures.[122] Accordingly, while the scope and application of the land ceilings legislation initially differed widely from State to State, the 1972-guidelines,[123] followed by the *2013 Draft Policy*, provided for some measure of uniformity in the land ceiling legislation in general.

The development of the scope and application of the land ceilings will be discussed below having regard to the position under the Second Five Year Plan; the 1972-guidelines and the *2013 Draft Policy* respectively. As mentioned, it is not feasible to discuss each State's laws. Accordingly, specific reference to the legal position in West Bengal regarding the unit of application; classification of land; exemptions; ceiling limit; compensation; and beneficiaries will be discussed.[124]

3 2 1 Unit of application of ceiling

The Planning Commission, in terms of its Second Five Year Plan, gave a broad suggestion that the unit of application should be three family holdings.[125] Ultimately however, the question whether the determined ceiling should apply to individual units/holdings or family

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[118] See K Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11-01-2019).

[119] Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11-01-2019).

[120] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013).

[121] Appu *Land Reforms in India* 167, 189.

[122] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248. See also Acharya "The Indian Urban Land Ceiling Act: A critique of the 1976 Legislation" <http://documents.worldbank.org/curated/en/631451468750264120/pdf/multi-page.pdf> (accessed 28-05-2017) 39-51.

[123] See in general W Ladejinsky "New ceiling round and implementation prospects" (1972) 7 *Economic and Political Weekly* A125-A132. The 1972-guidelines, in terms of which States amended their land ceiling legislation were shaped by a compromise of view of the Central Land Reform Committee; the Ministry of Food and Agriculture; the nine member panel appointed by Congress; the Congress Working Committee; and the conference of the State Chief Ministers held in March 1972.

[124] The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247. See further in general Bandyopadhyay (2003) *Economic & Political Weekly* 879-884; Ghosh & Nararai (1978) *Social Scientist* 50-67; Sarkar (2007) *Economic & Political Weekly* 1435-1442 and Rawal (2008) *Economic & Politcal Weekly* 43-47.

[125] Appu *Land Reforms in India* 144.

units/holdings was left to the respective Indian States.[126] If States decided on family holdings as the unit of application, it had to determine the area of land that would constitute a family holding in different regions, taking into consideration *inter alia* the classes of soil and irrigation.[127] Ancillary to determining what the unit of application for land ceilings should be was the determination of what constituted a "family unit" or "family holding".[128] In other words, States had to determine what allowance should be made for the size of the family in the application of the land ceiling.[129]

The 1972-guidelines provided that the ceiling imposed must apply to the family as a unit, instead of individual members of the family, as was the case in some States.[130] Furthermore, the 1972-guidelines determined that the unit of application shall be a family of five members, given that the term "family" is defined to include husband, wife and minor children.[131] Every major son will be treated as a separate unit of application.[132] In cases where the number of family members exceeds five, additional land may be allowed for each member in excess, provided that the total area admissible to the entire family could not exceed double the ceiling for a family of five members.[133]

The State of West Bengal initially determined that the ceiling should apply to individual landholders.[134] However, subsequent to the recommendations in the 1972-guidelines, West Bengal changed the unit of application to "family" holdings. The ceiling legislation in West

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[126] Behuria *Land Reform Legislations in India* 166-183; Appu *Land Reforms in India* 140, 144.
[127] Appu *Land Reforms in India* 144.
[128] Appu *Land Reforms in India* 140. See section 3(f) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 3(d) the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 2(ee) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 2(16) read with section 6(2) of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 3(f) of the Haryana Ceiling on Landholding Act 26 of 1972; section 3(f) of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 2(6) of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; section 2(12) read with section 2(17) of the Karnataka Land Reforms Act 10 of 1962; section 2(14) of the Kerala Land Reforms Act 1 of 1964; section 2(gg) of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 37(b) of the Orissa Land Reforms Act 16 of 1960; section 3(4) of the Punjab Land Reforms Act 10 of 1973; section 2(f) of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; section 2(i) of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; section 3(14) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; section 3(7) of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and section 14K(c) of the West Bengal Land Reforms Act 10 of 1965 for the different definitions of "family" under the different States' ceiling legislation.
[129] Appu *Land Reforms in India* 141.
[130] W Ladenjinksy "Land ceilings and Land reform" (1972) *Economic and Political Weekly* 401-408 401; Behuria *Land Reforms Legislation in India* 133.
[131] Ladenjinksy (1972) *Economic and Political Weekly* 401; Appu *Land Reforms in India* 166; Behuria *Land Reforms Legislation in India* 133.
[132] Appu *Land Reforms in India* 166.
[133] 166.
[134] Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11-01-2019).

Bengal provides for a concept of a joint family, limited to five members to constitute a unit.[135] The WBLRA provides for a rather extended definition of "family", in relation to a *raiyat*[136] (land holder or owner).[137] A "family", in relation to a *raiyat*, will be deemed to consist of, but limited to five members, including:

> "(i) [the *raiyat*] himself and his wife, minor sons, unmarried daughters, if any; (ii) his unmarried adult son[s], if any, who does [*sic*] not hold any land as a *raiyat*; (iii) his married adult son, if any, where neither such adult son nor the wife nor any minor son or unmarried daughter of such adult son holds any land as a *raiyat*; (iv) [a] widow of this predeceased son, if any, where neither such widow nor any minor son or unmarried daughter of such widow holds any land as a *raiyat*; [and] (v) a minor son or unmarried daughter, if any, of his predeceased son, where the widow of the predeceased son is dead and any minor son or unmarried daughter of the predeceased son does not hold any land as a *raiyat".*[138]

No other person shall be regarded as part of the "family".[139] For the purpose of completeness, two further clarifications are provided for under the definition of "family". Firstly, an adult unmarried person shall include a man or woman who is divorced and who has not remarried thereafter.[140] Secondly, references in the clause to "wife", "son" or "daughter" shall, in relation to a female *raiyat* be construed as references to husband, son or daughter of such a woman instead.[141]

No recommendations with regard to the unit of application were set out in the *2013 Draft Policy*. The unit of application in West Bengal is therefore a "family" up to five members.[142]

3 2 2 Classification of land

With regard to the classification of land,[143] some States classified their land into different classes or according to a "standard acre". For example, in Andhra Pradesh, before the 1972-guidelines were imposed, a family holding was defined to be equal to either 6 acres of "class

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[135] Behuria *Land Reforms Legislation in India* 133.
[136] Essentially, a *raiyat is* a land holder or a land owner. Section 1(10) of the West Bengal Land Reforms Act 10 of 1956 defines a *raiyat* as a person or an institution holding land for any purposes whatsoever. In terms of chapter 2 of the same Act, a *raiyat* is a person who owns the land. See further, section 4(1) of the West Bengal Land Reform Act 10 of 1956.
[137] See chapter 2 of the West Bengal Land Reform Act 10 of 1956, which provides for the rights of a *raiyat* in respect of land.
[138] Section 14K of the West Bengal Land Reform Act 10 of 1956.
[139] Section 14K of the West Bengal Land Reform Act 10 of 1956.
[140] Section 14K of the West Bengal Land Reform Act 10 of 1956.
[141] Section 14K of the West Bengal Land Reform Act 10 of 1956.
[142] Behuria *Land Reforms Legislation in India* 134.
[143] Behuria *Land Reform Legislations in India* 166-183.

A land"; 8 acres of "class B land"; 10 acres of "class C" land etc.[144] As a result, for a family of five or fewer members, the actual area varied between a minimum of 27 acres and a maximum of 324 acres, depending on the classes of land in the holding.[145] The determination of different classifications of land took into account *inter alia* the availability of irrigation; the nature of the soil; the climate; and where the land was located.[146] Several States also adopted the concept of a "standard acre or hectare".[147] In general, a "standard acre or hectare" referred to an acre of irrigated land or other land of good quality in a State as a whole or in a region thereof.[148] In light of the quality of land available, other classes of land, for example, non-irrigated, hill or desert land were given corresponding lower values in terms of acres or hectares.[149] To illustrate, in terms of the West Bengal Land Reform Act, a "standard hectare" in relation to *agricultural land* is, for example, equivalent to (a) 1.00 hectare in an irrigated area; and (b) 1.40 hectares in any other area.[150] In relation to any other land, including land comprised in an orchard, a standard hectare is equivalent to 1.40 hectares.[151]

The 1972-guidelines provide for a simplified classification of land. It provides for 3 broad classes, namely (a) irrigated double cropped land; (b) irrigated single cropped; and (c) dryland,[152] whereas the *2013 Draft Policy* only provides for a classification of two types of land: irrigated and non-irrigated land,[153] with corresponding recommend ceiling limits.[154] In

[144] See sections 3(d), 3 (e) and 3(v) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 12 of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 4 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 2(6) of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 2(1) the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; schedule 1, part A of the Karnataka Land Reforms Act 10 of 1962; sections 2(10); 2(11); 2(24); 2(38) and 2(41) read with section 82 of the Kerala Land Reforms Act 1 of 1964; section 2(f) of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 2(5-a) read with section 2(13) of the Orissa Land Reforms Act 16 of 1960; section 4 of the Punjab Land Reforms Act 10 of 1973; section 4 of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; schedule 2 of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; section 2(40) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; section 2(11) of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and section 14(K)(f) of the West Bengal Land Reforms Act 10 of 1965.
[145] Appu *Land Reforms in India* 144.
[146] 144.
[147] 144.
[148] 144.
[149] 144.
[150] Section 14K(f)(i) of the West Bengal Land Reform Act 10 of 1956.
[151] Sections 14K(f)(ii) and (iii) of the West Bengal Land Reform Act 10 of 1956.
[152] Appu *Land Reforms in India* 173.
[153] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5.
[154] See the discussion of ceiling limits at 3 2 4 below. The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5 provides that "[e]very state should revise its ceiling limits, if the existing limit is more than 5-10 acres in the case of irrigated land and 10-15 acres for non-irrigated land".

line with the 1972-guidelines and the *2013 Draft Policy*, the WBLRA provides for the classification of and the determination of an irrigated area of land.[155]

3 2 3 Exemptions

Initially, the Planning Commission suggested in its Second Five Year Plan that a list of land tracts should be exempted from the operation of ceilings legislation, namely plantations of tea, coffee and rubber; existing orchards; cattle breeding farms; dairy and wool farms; well managed and mechanised farms;[156] and sugarcane farms operated by sugar factories.[157] However, State legislatures exempted many more categories of land.[158] Some exemptions were justified, such as land held by Central and State Governments and small parcels of land voluntarily gifted by wealthy landowners to the landless known as *Bhoodan* and *Gramdam* land.[159] Other exemptions were not justified. Appu identifies private forest land; land used for grazing cattle or growing trees; hill land and tank fisheries as unreasonable and unjustified exemptions.[160] States also generally exempted religious, charitable or educational institutions or trusts; private and public sector industries and cooperative farming industries.[161] Appu argues further that it would still be reasonable and justifiable if the latter institutions, trusts, industries and societies were allowed to keep a minimum area of land to carry out their respective legitimate activities.[162] Such a minimum area would have to be determined individually, based on the needs of the relevant institution, trust, industry or society.

The 1972-guidelines limited the number of exemptions from land ceiling legislation. It provided for the exemption of, *inter alia*, plantations of tea, coffee, rubber, cardamom and cocoa; *Bhoodan* and *Gramdam* land; land held by agricultural universities, colleges and schools and research institutions.[163] Furthermore, State governments may, at their discretion, grant exemption to existing religious, charitable and educational trusts and

[155] Section 14K(d), which provides for a definition of irrigated land, read with section 14N of the West Bengal Land Reform Act 10 of 1956.
[156] Although no definition or criteria are provided to determine if the farm is “well-managed” or “mechanised”. It is also unclear who would make such a determination.
[157] Appu *Land Reforms in India* 149.
[158] 149.
[159] These voluntary (as opposed to State instituted) land reform measures were driven by the Bhoodan-Gramdam movement. See R Church “Review: The impact of Bhoodan and Gramham on Village India” (1975) 48 *Pacific Affairs* 94-98. See also E Linton *Fragments of a Vision: A journey through India’s Gramdan villages* (1971).
[160] Appu *Land Reforms in India* 150.
[161] 150.
[162] 150.
[163] Appu *Land Reforms in India* 167.

institutions of a public nature.[164] In the case of co-operative farming societies exemption may be granted on the condition that computing the ceiling area for a member will take into account his or her share in the society as well as the other lands held by such a member.[165] It also provided that no exemptions should be granted to sugarcane farms and private trusts of any kind.[166] As a catch-all recommendation the 1972-guidelines provided that all other exemptions should be withdrawn.[167]

However, the *2013 Draft Policy* suggests that exemptions to religious, charitable, educational and research and industrial institutions, trusts or organisations as well as plantations and aqua farms should be strictly discontinued.[168] It recommends that these institutions, trusts, organisations and farms should be restricted to the use of one unit of 15 acres.[169]

[164] Appu *Land Reforms in India* 167.
[165] 167.
[166] 168.
[167] 168.
[168] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5. However, compare the different provisions dealing with numerous exemptions from the operation of land ceilings: Section 23 of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 2 of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 29 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 3 of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; sections 5 and 54 of the Haryana Ceiling on Landholding Act 26 of 1972; section 5 of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 3 of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; chapter 8 of the Karnataka Land Reforms Act 10 of 1962; section 81 of the Kerala Land Reforms Act 1 of 1964; section 3 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 38 of the Orissa Land Reforms Act 16 of 1960; section 14 of the Punjab Land Reforms Act 10 of 1973; section 22 of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; section 73 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; section 4 read with section 6 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978 and section 14M(6) read with section 14R of the West Bengal Land Reforms Act 10 of 1965. Only the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978 provides for no exemptions from the operation of the land ceilings.
[169] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5.

The ceiling legislation in West Bengal, in comparison to other States,[170] provides for only a few exemptions.[171] Firstly, the WBLRA provides that the ceiling limit shall not apply to any land owned by central, State or local authorities.[172] In other words, the land ceiling does not apply to State-owned land. Furthermore, it also provides that trusts or institutions of a public nature exclusively for a charitable or religious purpose or both, shall be deemed a *raiyat* and shall be entitled to retain lands not exceeding 7.00 standard hectares, notwithstanding the number of its centres or branches in the State.[173] Accordingly, while not exempting charitable or religious trusts or institutions from the operation of land ceilings, the Act does provide for an exception with regard to the ceiling limit. In other words, charitable and/or religious trusts and institutions are allowed to hold or own more land than other *raiyats*. In comparison, these types of trusts and institutions are absolutely exempted from the operation of the land ceiling legislation in other States.

Limiting the number of exemptions also makes more land available for redistribution, which contributes overall to the effective implementation of the ceiling legislation.

3 2 4 Ceiling limit

The ceiling limit also differs from State to State, depending on the quality or the nature of the land.[174] Each State took into account a variety of factors to determine the land ceiling,

[170] Behuria *Land Reforms Legislation in India* 136. Compare Section 23 of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 2 of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 29 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 3 of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; sections 5 and 54 of the Haryana Ceiling on Landholding Act 26 of 1972; section 5 of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 3 of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; chapter 8 of the Karnataka Land Reforms Act 10 of 1962; section 81 of the Kerala Land Reforms Act 1 of 1964; section 3 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 38 of the Orissa Land Reforms Act 16 of 1960; section 14 of the Punjab Land Reforms Act 10 of 1973; section 22 of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; section 73 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; section 4 read with section 6 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978 and section 14M(6) read with section 14R of the West Bengal Land Reforms Act 10 of 1965. Only the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978 provides for no exemptions from the operation of the land ceilings.

[171] Section 14Z of the West Bengal Land Reforms Act 10 of 1956 applies to all lands of any class.

[172] Section 14R of the West Bengal Land Reforms Act 10 of 1956. See Behuria *Land Reforms Legislation in India* 136.

[173] Section 14M(6) of the West Bengal Land Reforms Act 10 of 1956.

[174] Behuria *Land Reform Legislations in India* 134, 166-183. Compare sections 4 and 4A read with section 3(c) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 4 of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 4 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 6 of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 7 of the Haryana Ceiling on Landholding Act 26 of 1972; section 6 of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 2(1) of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; section 63 of the Karnataka Land Reforms Act 10 of 1962; section 82 of the Kerala Land Reforms Act 1 of 1964; section 7 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; sections 37A and 39 of the Orissa Land Reforms Act 16 of 1960; sections 4 and 7 of the Punjab Land Reforms Act 10 of 1973; sections 4 and 5 of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; section 6 of

including: climate; value of the lands in terms of crop potential; fertility of the soil; size of the property or family and production output.[175] For example, if the land in question was arid with low productivity, the land ceiling was higher in contrast to a lower land ceiling for fertile land.[176] Similarly, a lower land ceiling was imposed on irrigated land, whereas unirrigated land allowed for a higher land ceiling.[177] Other factors that impact on determining the ceiling limit are the unit of application (including the allowance for the size of the "family") and the classification of land.[178]

The 1972-guidelines provided for revised ceiling limits. The recommended ceiling limit for best category land in a State with assured irrigation and capable of producing at least two crops a year is 10-18 acres.[179] In other words, no owner is entitled to hold more than 10-18 acres of irrigated double cropped lands.[180] It also determined that in relation to second class land the ceiling limit should range between 18 and 27 acres.[181] Furthermore, no person may hold more than 54 acres of dry land,[182] with the exception of hill and desert areas that may have a marginally higher land ceiling.[183]

The *2013 Draft Policy* proposes that States should revise their ceiling limits where the existing limit is more than 5-10 acres for irrigated land and 10-15 acres for non-irrigated land.[184] Given the different climatic conditions, the crops grown and especially the density

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the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; sections 5 and 7 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; sections 5 read with section 4 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978 and section 14K of the West Bengal Land Reforms Act 10 of 1965. For a brief summary of the ceiling limits from 1950-1970 in Jammu & Kashmir; West Bengal; Andhra Pradesh; Assam; Bihar; Gujarat; Punjab; Haryana; Kerala; Maharashtra; Karnataka; Madhya Pradesh; Orissa; Rajasthan; Tamil Nadu and Uttar Pradesh, see Appu *Land Reforms in India* 145-149. See also Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11-01-2019); A Nauriya "The land question in Southern Africa and India" <http://www.satyagraha.org.za/word/the-land-question-in-southern-africa-and-india-by-anil-nauriya/> (accessed 11-01-2019).

[175] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 11.

[176] Nauriya "The land question in Southern Africa and India" <http://www.satyagraha.org.za/word/the-land-question-in-southern-africa-and-india-by-anil-nauriya/> (accessed 11-01-2019).

[177] Nauriya "The land question in Southern Africa and India" <http://www.satyagraha.org.za/word/the-land-question-in-southern-africa-and-india-by-anil-nauriya/> (accessed 11-01-2019).

[178] Appu *Land Reforms in India* 149.

[179] 149.

[180] 165.

[181] Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11-01-2019).

[182] Ladenjinksy (1972) *Economic and Political Weekly* 401.

[183] Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11-01-2019).

[184] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013). See also Appu *Land Reforms in India* 267-273.

of the population in each State, it is reasonable to provide for a small range within which the ceiling limit should be fixed, as opposed to introducing a precise and uniform limit for all States.[185]

Initially, West Bengal imposed a uniform ceiling of 25 acres on individual (as opposed to family) holdings.[186] However, in line with the 1972-guidelines, the legislation in West Bengal was amended to apply to a family unit or holding as mentioned above. The ceiling limit was also reduced to 5 hectares (12.4 acres) irrigated land or 7 hectares (17.3 acres) of unirrigated land[187] for a "family" of five members.[188] The *2013 Draft Policy* recommendations do not apply to West Bengal because the legislation is already in line with the newly proposed ceiling limits.[189]

Lowering the ceiling limit, while taking into account the operational requirements of the land for effective productivity, ensures that more land is classified as ceiling-surplus land, which in turn ensures that more land is in principle available for redistribution.

3 2 5 Payment of compensation

The Planning Commission left it to the State governments to decide on the principles applicable for determining compensation for ceiling-surplus land, in light of local conditions.[190] Predictably, this resulted in a lack of uniformity regarding the determination of the amount of compensation payable, if any, to land holders expropriated of ceiling-surplus land. However, given that the States applied and defined factors such as the unit of application, the categories of land, exemptions and ceiling limits differently, it is

[185] Appu *Land Reforms in India* 295.
[186] 144-145.
[187] Section 14M of the West Bengal Land Reform Act, 1955; Appu *Land Reforms in India* 145.
[188] Behuria *Land Reforms Legislation in India* 136.
[189] Section 14M of the West Bengal Land Reform Act, 1955.
[190] For a comparison of the amount of compensation for ceiling-surplus land, see Behuria *Land Reforms Legislation in India* 189-211. Compare section 15 and schedule 2 of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 12 the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; sections 14 and 23 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 23 of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; sections 16-17 of the Haryana Ceiling on Landholding Act 26 of 1972; section 14 of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 11 and Part B of Schedule 3 of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; section 72 of the Karnataka Land Reforms Act 10 of 1962; sections 91-93 of the Kerala Land Reforms Act 1 of 1964; sections 16-21 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; sections 47 and 50 of the Orissa Land Reforms Act 16 of 1960; section 10 of the Punjab Land Reforms Act 10 of 1973; section 19 of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; sections 12 and 15 of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; sections 50, 54 and 55 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; sections 17 and 22 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and section 14V of the West Bengal Land Reforms Act 10 of 1965. Appu *Land Reforms in India* 141, 150.

comprehensible that different methods of calculating compensation would inevitably arise. The 1972-guidelines also provided that:

> "Compensation payable for the surplus land on the imposition of ceiling laws should be fixed well below the market value of the property so that it is within the paying capacity of the new allottees mainly comprising the landless agricultural workers who belong to the Scheduled Castes and the Scheduled Tribes."[191]

No guidelines on the calculation of compensation for ceiling-surplus land were provided for in the *2013 Draft Policy.*

Some States have provided for the determination of an amount of compensation on the basis of land revenue while other States determine the amount of compensation on the basis of the classification of the land.[192] The WBLRA provides that the State shall pay compensation for land which vests in the State (ceiling-surplus land).[193] The amount of compensation shall be equal to fifteen times the land "revenue"[194] or its "equivalent assessed for such land".[195] However, it is unclear how or when the "equivalent assessed for such land" will be calculated. Furthermore, where such land revenue or its equivalent has not been assessed or is not required to be assessed, an amount calculated at the rate of 135 rupees for an area of 0,4047 hectare applies.[196]

Regardless of the manner in which the amount of compensation is determined, the amounts cannot be challenged in a court of law.[197] Behuria explains in this regard that:

> "…all State ceiling laws have been included in the 9th Schedule of the Constitution as per Article 31-C, as [the laws] are intended to achieve the objectives enshrined in the Directive Principles of State Policy in Arts. 39(b) and 39(c) of the Constitution."[198]

Furthermore, Behuria suggests that the amount of compensation paid to land owners for the acquisition of ceiling-surplus land is negligible when compared with the market value of the

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[191] Ashokvardhan *Ceiling Laws in India* 19-20.
[192] Behuria *Land Reforms Legislation in India* 140.
[193] Section 14V of the West Bengal Land Reforms Act 10 of 1956.
[194] Section 3(11) defines "revenue" as that which is lawfully payable or deliverable in money or in kind or both by a *raiyat* under the provisions of the Act in respect of the land held by him or her. See also Chapter 4 of the West Bengal Land Reforms Act 10 of 1956 for other provisions relating to revenue.
[195] Section 14V of the West Bengal Land Reforms Act 10 of 1956.
[196] Section 14V of the West Bengal Land Reforms Act 10 of 1956.
[197] Article 31C of the Constitution of India, 1950.
[198] Behuria *Land Reforms Legislation in India* 140.

land.[199] Notably, the amount of compensation payable to the land owner is generally below market value.[200]

3 2 6 Beneficiaries

Once ceiling-surplus land is identified and acquired by the State government, it is necessary to determine to whom the land should be redistributed, namely whom the intended beneficiaries should be. From the outset, the Second Five Year Plan recommended that preference should be given to displaced tenants; landless farm workers; and farmers with uneconomic agricultural landholdings.[201] However, no guidance pertaining to what constitutes an uneconomic agricultural landholding was provided. The 1972-guidelines provided that priority should be given to the landless agricultural workers, in particular those belonging to the Scheduled Castes ("SCs") and Scheduled Tribes ("STs").[202] The SCs and STs are constitutionally recognised and regarded as officially designated groups of historically disadvantaged people in India.[203]

Despite the recommendations, the States had to determine who would be eligible to be regarded as a beneficiary under the ceilings legislation and what type of land rights would be granted accordingly. Most ceiling laws make provision for the distribution of ceiling-surplus land to landless; agricultural tenants or labourers and/or displaced persons.[204] However, the priority or order of allotment of ceiling-surplus land to the beneficiaries varies widely from State to State.[205] For example, States may provide for lists of beneficiaries, in order of priority. In some States, first priority is given to agricultural tenants, while in other States preference is given to agricultural labourers in the SCs or STs.[206]

The type of land rights granted to the beneficiaries or the terms of settlement on the ceiling-surplus land also differs greatly from State to State.[207] Some States completely prohibit beneficiaries from transferring ownership of the agricultural land once they have acquired

[199] Behuria *Land Reforms Legislation in India* 140.
[200] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.
[201] Appu *Land Reforms in India* 141.
[202] Behuria *Land Reforms Legislation in India* 142, 164.
[203] Article 366, clauses 24 and 25 of the Constitution of India, 1950 specifically recognises SCs and STs. See also Behuria *Land Reforms Legislation in India* 142, 164.
[204] Behuria *Land Reforms Legislation in India* 144-160.
[205] 144-160.
[206] 144-160.
[207] Behuria *Land Reforms Legislation in India* 143; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.

it,[208] whereas other States prohibit transfer of ownership for a period of time only (ranging from 10-20 years).[209] The legislation may also require the beneficiary to use the land for a particular purpose, such as "personal cultivation".[210]

The WBLRA sets out principles for the distribution of ceiling-surplus land.[211] Among eligible persons, first priority is given to the *bargardar* cultivating the land.[212] Thereafter preference is given to people belonging to the SCs or STs or cooperative societies.[213] Furthermore, in relation to the eligibility criteria, the Act provides that persons who are local residents where the ceiling-surplus land is situated, and who together with other members of their family, own no land or less than 0,4047 hectares of land used for the purpose of agriculture,[214] provided that in the case of agricultural land specifically, such a person intends to bring the land under "personal cultivation",[215] will be regarded as beneficiaries.[216] Accordingly, *bargardars* or persons belonging to the SCs or STs must reside for the greater part of the year in the locality where the ceiling-surplus land is situated. The section further provides that the principal source of such a person's income must also be the produce of such land.[217] In this regard, the terms of settlement under the Act also provide that the beneficiary must use the land, in the case of agricultural land, for a particular purpose, namely "personal cultivation".[218] Under the Act, "personal cultivation" is defined as cultivation by a person of his own land on his own account by his own labour; or by the labour of any member of his family or by servants or labourers on wages payable in cash and kind.[219] Furthermore, a person will not be eligible for the redistributed land if he or she or a member of his or her

[208] See for example, section 49(1A) of the West Bengal Land Reforms Act 10 of 1956.
[209] Behuria *Land Reforms Legislation in India* 143; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.
[210] "Personal cultivation" is defined differently in the respective States' land reform legislation. See also section 1(8) of the West Bengal Land Reforms Act 10 of 1956.
[211] Sections 49 and 49A of the West Bengal Land Reforms Act 10 of 1956.
[212] Section 1(2) of the West Bengal Land Reforms Act 10 of 1956 defines a "bargardar" as a "person who…cultivates the land of another person on condition of delivering a share of the produce of such land to that person".
[213] Section 49(1) of the West Bengal Land Reforms Act 10 of 1956. See also Behuria *Land Reforms Legislation in India* 157.
[214] Section 49 of the West Bengal Land Reforms Act 10 of 1956.
[215] Section 1(8) of the West Bengal Land Reforms Act 10 of 1956 provides for a definition of "personal cultivation". It means cultivation by a person of his own land on his own account by his own labour; or by the labour of any member of his family or by servants or labourers on wages payable in cash and kind. The section further provides that such a person or a member of his family must reside for the greater part of the year in the locality where the land is situated and the principal source of his income must also be the produce of such land.
[216] Section 49 of the West Bengal Land Reforms Act 10 of 1956.
[217] Section 1(8) of the West Bengal Land Reforms Act 10 of 1956.
[218] "Personal cultivation" is defined differently in the States' land reform legislation.
[219] Section 1(8) of the West Bengal Land Reforms Act 10 of 1956.

family is engaged or employed in any business, trade, undertaking, manufacture, service or industrial occupation.[220]

Beneficiaries, once settled, acquire ownership of the ceiling-surplus land and are prohibited from transferring or burdening the land,[221]

> "except by way of a simple mortgage or mortgage by deposit of title deeds in favour of a Scheduled Bank, or a Co-operative Society or a Corporation owned or controlled by the Central or State Government or both, and for the purpose of obtaining [a] loan for the development of [the] land or for the improvement of agricultural production or for the construction of a dwelling house".[222]

Accordingly, once the beneficiary has acquired the ceiling-surplus land, the sale thereof is prohibited. However, in West Bengal, no time period is attached to this prohibition and therefore it is unclear whether the beneficiary or his/her heirs may be allowed to sell the land in future once it is acquired.

The *2013 Draft Policy* proposes that land should, in future, be redistributed to marginalised women.[223] The Policy recognises that 40% of the agricultural workforce consists of women and that households are becoming *de facto* female headed households.[224] Furthermore, the Policy recognises that "agricultural productivity is increasingly…dependent on the ability of women to function effectively as farmers".[225] In this regard, it recommends ensuring effective and independent land rights for women.[226]

In light of the widely differential approach to land ceilings, it is inevitable that some States would be more successful than others.[227] In order to formulate and implement effective land

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[220] Section 49 of the West Bengal Land Reforms Act 10 of 1956.
[221] Section 49(1A) of the West Bengal Land Reforms Act 10 of 1956.
[222] Section 49(1A) of the West Bengal Land Reforms Act 10 of 1956.
[223] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 2. See also Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 250-253.
[224] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 18. See also Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 250-253.
[225] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 18. See also Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 250-253.
[226] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 18-19.
[227] Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 4. West Bengal comprises only 3.3% of the land in India, but it is responsible for 20% of the redistribution of surplus-ceiling land. The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land*

ceiling legislation in South Africa, it is necessary to learn from the problems experienced by land ceilings legislation and policy in India.[228] Accordingly, the reasons for the failure of land ceilings are explored in the next section.

3 3 Reasons for failure of land ceilings in India

Despite some exceptions,[229] the imposition of land ceilings was largely ineffective and unsuccessful for redistribution purposes.[230] Ray estimates that over a period of 35 years, less than 2% of the total operated land has been redistributed.[231] According to various authors,[232] the ineffective use of the land ceiling legislation can be attributed to the following considerations:

Firstly, the specific formulation of legislation allowed land owners to use the various gaps and/or loopholes in the laws to their advantage.[233] Some States limited the application of the land ceiling by restricting or limiting the type of land to which the legislation was applicable, which resulted in less land being available for redistribution.[234] The inadequate definition of (agricultural) land allowed land owners to re-classify their land to fall outside the

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Reforms Policy (18 July 2013) 5 policy identifies West Bengal, Kerala and Jammu & Kashmir as achieving some measure of success with the implementation of its land ceiling policy, although the policy does not set out the basis for determining the success of the individual States. See Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247.

[228] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.

[229] See Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 4; The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247.

[230] Appu *Land Reforms in India* 178; Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5.

[231] SK Ray "Land system and its reform in India" (1996) 51 *Indian Journal of Agricultural Economics* 220-237. See also Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.

[232] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246; Behuria *Land Reforms Legislation in India* 132.

[233] Sethi "Land reform in India: Issues and challenges" in *Promised Land: Competing Visions of Agrarian Reform* 75.

[234] Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 26; Besley & Burgress (2000) *The Quarterly Journal of Economics* 389, 394.

scope of ceiling legislation, thereby circumventing it.[235] In comparison to other States, West Bengal adopted a very wide definition of "land",[236] which prevented land owners from reclassifying their land to fall outside the scope and application of the ceiling legislation.[237] Apart from the formulation of the definition of land, States also allowed for a number of exemptions in the legislation.[238] For example, land held for religious, charitable or educational purposes and certain types of crops particular to each State are exempted from the operation of the legislation.[239] These exemptions also made it possible for owners to reclassify their land as falling under one of the exemptions, thereby circumventing the provisions of the legislation.[240] As mentioned above, West Bengal is one of the States with the smallest number of exemptions, which resulted in more land (not only agricultural land) being available for redistribution.[241]

Due to the formulation of the legislation, land ceilings were also set too high in relation to the average household operational holdings to have much of an impact on the agrarian structure.[242] The higher the ceiling, the less land could be identified as ceiling-surplus land, which also resulted in less land being available for redistribution.[243] In this regard, in comparison to other States, West Bengal from the outset provided for a low ceiling which may have contributed to more successful and effective redistribution of land.[244]

In general, land ceiling legislation did not provide for prohibiting transfers retrospectively.[245] Accordingly, in anticipation of the implementation of land ceiling legislation, land owners resorted to partitions and fictitious transfers (known as *Benami* transactions, which are discussed in more detail below) to circumvent the legislation.[246] Only the States of Gujarat

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[235] Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 26; Besley & Burgress (2000) *The Quarterly Journal of Economics* 389, 394.
[236] Section 2(7) of the West Bengal Land Reforms Act 10 of 1956.
[237] Besley & Burgress (2000) *The Quarterly Journal of Economics* 389, 394.
[238] See 3 2 3 above. See also Behuria *Land Reforms Legislation in India* 132.
[239] See 3 2 3 above.
[240] Appu *Land Reform in India* 154; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 15, 28.
[241] See 3 2 3 above.
[242] R Mearns "Access to land in rural India: Policy issues and options" *World Bank Policy Research Working Paper* 2123 (May 1999) 10; Behuria *Land Reforms Legislation in India* 132.
[243] See Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28.
[244] See 3 2 4 above.
[245] For an exposition of the States that provided for land ceiling legislation with retrospective effect, see Behuria *Land Reforms Legislation in India* 184-211.
[246] Behuria *Land Reforms Legislation in India* 132.

and West Bengal provided for the retrospective effect of the land ceiling legislation. Other States only banned transfers after the implementation of the ceiling law.[247]

Secondly, the reluctance of States to implement land ceilings vigorously is also regarded as a reason for failure.[248] Lack of political will on the part of the States,[249] administrative delays given the tedious processes set out in the ceiling legislation for acquiring and disposing of the ceiling-surplus land and/or land disputes in courts dealing with the classification of land and determining whether the land constitutes ceiling-surplus land[250] count among some of the reasons for the States' reluctance to implement land ceilings effectively. As mentioned above,[251] the determination of fair compensation, approached differently by each State, was regarded as fixed and could not be challenged in the courts[252] and therefore could not contribute to the delay in implementation of land ceiling legislation.

West Bengal is regarded as one of the States that administered and implemented its land ceiling legislation effectively.[253] In light of the resolution of land disputes by the civil courts which follow strenuous procedures and may be time-consuming and costly, the WBLRA bars the jurisdiction of civil courts in almost all matters dealt with in the Act.[254] Instead, the disputes between *raiyats* or between the *raiyats* and the government are decided by the revenue officers.[255] Appeals may be brought before the District Land and Land Reforms Officer or any other senior officers appointed or assigned for the purpose of hearing

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[247] Behuria *Land Reforms Legislation in India* 132.
[248] Sethi "Land reform in India: Issues and challenges" in *Promised Land: Competing Visions of Agrarian Reform* (2006) 75; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.
[249] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247-248.
[250] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 25 provides that the absence of a common adjudicatory body and uniform procedure lead to complexities and delays in the settlement of land disputes. See also Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27.
[251] See 3 2 5 above.
[252] Article 31C of the Constitution of India, 1950.
[253] Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 4; the Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247.
[254] Sections 34 and 61 of the West Bengal Land Reforms Act 10 of 1956.
[255] Section 53A of the West Bengal Land Reforms Act 10 of 1956. See also LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* <https://openknowledge.worldbank.org/handle/10986/28516?locale-attribute=es> (accessed 22-01-2019) 16.

appeals.[256] Accordingly, disputes are dealt with by specialised administrative officials instead of the judiciary which may in turn speed up the redistribution of agricultural land.

Coupled with the lack of retrospective effect of the land ceiling legislation, the untimely implementation of the ceiling legislation by State governments gave land owners time to dispose of land that would fall above the ceiling limit, by resorting to partitions and transfers.[257] For example, land owners would resort to *benami* transactions[258] to dispose of surplus land or gift the land among relations, friends and dependents.[259] Before the *Benami* Transactions (Prohibition) Act 45 of 1988 came into force, *benami* transactions were legal in India and there was no bar or punishment under any law for entering into any *benami* transactions.[260] In this regard the land ceilings legislation in general did not make provision for dealing with *benami* transfers. The property, which formed the subject matter of the *benami* transactions, was also not liable for confiscation by the government. The 1988 Act, as its title indicates, was enacted with the aim of prohibiting *benami* transactions. However, the 1988 Act did not provide for an adequate mechanism to enforce the prohibition against *benami* transactions. The *2013 Draft Policy* recommended that the Act be amended for the purpose of curbing and monitoring evasions of ceiling legislation through fraudulent, *benami*, land transactions.[261] The *Benami* Transactions (Prohibition) Amendment Act 43 of 2016

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[256] Section 54 of the West Bengal Land Reforms Act 10 of 1956. See also LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 16 which states that an aggrieved party may approach the Land Reforms Tenancy Tribunal regarding the decisions of the appellate authority and the decision of the Tribunal can be challenged before the Division Bench of the High court earmarked for this purpose.

[257] Appu *Land Reforms in India* 154; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28, 148.

[258] *Benami* is essentially an Indian origin word which means holding in someone else's or a fictitious name to cover up the identity of the beneficial owner. In 1980, the Supreme court in *Thakur Bhim Singh (Dead) v Thakur Kan Singh* AIR 1980 SC 727 para 14 provided for two types of transactions that constituted a "*benami* transaction". Firstly, when a person buys a property with his own money in the name of another person without any intention to benefit such other person and secondly, when a person who is owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property. See also section 2(9) of the *Benami* Transactions (Prohibition) Act 45 of 1988 which defines a *benami* transaction as "any transaction in which property is transferred to one person for a consideration paid or provided by another person". See further section 2(9) as amended by the *Benami* Transactions (Prohibition) Amendment Act 43 of 2016. The Amendment Act amends this definition to add other transactions such as property transactions where: (i) the transaction is made in a fictitious name; (ii) the owner is not aware of or denies knowledge of the ownership of property, or (iii) the person providing the consideration for the property is not traceable. The Amendment Act also provides for harsher penalties such as confiscation of "*benami* property" and imprisonment.

[259] Appu *Land Reforms in India* 154.

[260] A Mehta "End of *benami* transactions? (PBTA, 1988)" (2017) 2 *The Chamber's Journal* 43-49 43 <https://www.khaitanco.com/PublicationsDocs/CJ_November_2017-Ashish%20Mehta.pdf> (accessed 19-01-2019).

[261] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 6; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28 and

provides for (a) a wider definition of *benami* transactions;[262] (b) process of confiscation and acquisition of *benami* property by the government against payment of no compensation and;[263] (c) imprisonment for persons conducting *benami* transactions.[264] The disposal of surplus land to relations, friends and dependents, by way of *benami* transactions, not only made less land available for redistribution, but it was also difficult to determine who the true owner of the property, specifically (agricultural) land, was. Accordingly, these types of transactions also contributed towards one of the reasons for the inaccurate or incomplete land records. In this regard, the act of monitoring the type of transactions conducted, is also integral in the legislation's success or not.

Thirdly, linked to the above, the lack of accurate and updated land records in India is regarded as a major constraint to the effective implementation of ceiling legislation.[265] The lack of accurate and updated land records not only makes it difficult to identify the land owners (or *raiyats*), but it also poses difficulties in calculating or considering whether the legislation has been successful.[266] In West Bengal, the Land Information System has three distinct divisions, i.e. (a) cadastral map;[267] (b) record of rights;[268] and (c) registration of conveyance instruments for transfer of land and mortgages. The cadastral map and the

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Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247.

[262] Section 2(9) of the *Benami* Transactions (Prohibition) Amendment Act 43 of 2016. See also VP Dalmia "India: *Benami* transactions in India and analysis of the provisions relating to attachment and confiscation of property under the *Benami* Transactions (Prohibition) Amendment Act, 2016" (05-01-2018) <http://www.mondaq.com/india/x/661234/White+Collar+Crime+Fraud/Benami+Transactions+In+India+And+Analysis+Of+The+Provisions+Relating+To+Attachment+And+Confiscation+Of+Property+Under+The+Benami+Transactions+Prohibition+Amendment+Act+2016> (accessed 19-01-2019).

[263] Section 27 of the *Benami* Transactions (Prohibition) Amendment Act 43 of 2016. See also Dalmia "India: *Benami* transactions in India and analysis of the provisions relating to attachment and confiscation of property under the *Benami* Transactions (Prohibition) Amendment Act, 2016" (05-01-2018).

[264] Section 53 of the Benami Transactions (Prohibition) Amendment Act 43 of 2016.

[265] Mearns *World Bank Policy Research Working Paper* 2123 (May 1999) 10; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247, 259; Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 28 suggests that the States should hold inventory of surplus land. See also Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 40.

[266] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247, 259; Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 28; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 40.

[267] The Bengal Tenancy Act 1885 for the first time provided the legal basis for preparation of revenue village maps following the method of cadastral survey. On the basis of such maps, the records of rights were prepared.

[268] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14 explains that the record of rights contained particulars relating to each tenant or occupant of the land or sharecropper, the name of each tenant's or occupant's landlord, classification and quantity of land of each tenant etc. The record of rights were revised in the fifties under the West Bengal Estate Acquisition Act 1 of 1954. Revision of record of rights was again taken up in 1975 under the West Bengal Land Reforms Act 10 of 1956, and is not complete yet in respect of all the administrative districts of the State.

record of rights are prepared by the Land and Land Reforms Department, while the registration of deeds for transfer of land and mortgages is administrated by the Finance Department.[269]

The State has the obligation to maintain and update land records in accordance with changes as a result of transfer or inheritance.[270] The efficacy of the ceiling legislation will be improved provided that the State takes appropriate and effective steps in maintaining and updating the land records in accordance with the transfer of land to beneficiaries under the Act.[271] In 1990, West Bengal started digitizing the record of rights[272] and is the first State to integrate digitized cadastral maps with related record of rights.[273] In this regard, the State has recently amended the WBLRA to facilitate e-delivery of land records through affixing digital signatures.[274] This has enhanced speed of service delivery to a great extent and has contributed to the effective implementation of the ceiling legislation.

Fourthly, the inadequate or unfair compensation paid to land owners[275] for surplus land, made the programme unpopular with land owners, which in turn led to land owners using loopholes and gaps in the legislation discussed above.[276] It is postulated that the prohibition against challenging the manner in which the amount of compensation is determined and/or the amounts awarded to land owners in a court of law also contributed to the use of loopholes and gaps in the legislation.[277] As mentioned above, the WBLRA provides the amount of compensation shall be equal to fifteen times the land "revenue"[278] or its equivalent assessed for such land.[279] Furthermore, where such land revenue or its equivalent has not

[269] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 13-14.
[270] Section 50 of the West Bengal Land Reforms Act 10 of 1956.
[271] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14.
[272] Accordingly to the LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14, the record of rights are completely digitized except those of 1473 odd revenue villages of three districts. Those records are expected to be completed within a short period of time.
[273] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14.
[274] Section 50(2) of the West Bengal Land Reforms Act 10 of 1956.
[275] Mearns *World Bank Policy Research Working Paper* 2123 (May 1999) 10; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247.
[276] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.
[277] Article 31C of the Constitution of India, 1950.
[278] Section 3(11) defines "revenue" as that which is lawfully payable or deliverable in money or in kind or both by a *raiyat* under the provisions of the Act in respect of the land held by him or her. See also Chapter 4 of the West Bengal Land Reforms Act 10 of 1956 for other provisions relating to revenue.
[279] Section 14V of the West Bengal Land Reforms Act 10 of 1956.

been assessed or is not required to be assessed, an amount calculated at the rate of 135 rupees for an area of 0,4047 hectare automatically applies.[280] It is unclear whether these amounts may be higher or lower than the market value of the land. However, generally, the amount of compensation is lower than market value.[281]

Fifthly, where ceiling-surplus land was identified and acquired, it generally remained in the hands of the State government.[282] Land can only be regarded as redistributed once it has been allotted and transferred to the intended beneficiaries. The lack of redistribution of ceiling-surplus land accordingly, also contributed to the success of the implementation of the ceiling legislation in different States.

Finally, a distinction needs to be drawn between the *quantity* of land redistributed and the number of beneficiaries who receive the land on the one hand, and the *quality* of land redistributed to a number of beneficiaries, on the other hand.

Where land was redistributed, the States distributed the land in relatively large parcels, which meant that only a small percentage of landless families benefitted.[283] In such cases, more ceiling-surplus needs to be available for redistribution to benefit a larger number of beneficiaries. To maximise the quantity of land available for redistribution, the *2013 Draft Policy* proposes that States create a "land pool"[284] consisting of *inter alia* (a) agricultural waste land; (b) unutilised land acquired, purchased and/or leased out to industries for development purposes; (c) surplus ceiling land; and (d) *Bhoodan* land unlawfully occupied.[285]

Unlike most States, West Bengal focused on distributing ceiling-surplus land to as many landless families as possible, instead of aiming to provide each beneficiary with a "full-size" farm.[286] Accordingly, the size of land was smaller, but a bigger percentage of beneficiaries

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[280] Section 14V of the West Bengal Land Reforms Act 10 of 1956.
[281] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.
[282] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246. See Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27.
[283] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246, 255.
[284] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 4.
[285] 4-5.
[286] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247, 249.

benefitted. However, while the ceiling-surplus land was redistributed in relatively small parcels, it is questionable whether the quality of land was of such a nature for the beneficiaries to cultivate the land. Appu notes that the poor quality of surplus land available for redistribution and the lack of financial assistance to the landless to bring the land under cultivation, further reduced the benefits that could have accrued to the beneficiaries.[287] It is thus not surprising that beneficiaries, once they received some form of land, would want to sell and transfer it. As explained, some States, like West Bengal, prohibit beneficiaries from transferring the land once acquired.[288]

Accordingly, it is opined that the quantity of the land to be redistributed should be determined by the quality of the ceiling-surplus land. Where the land is dry or arid, a larger parcel of land may be redistributed to a beneficiary. Where the land is irrigated or fertile, a smaller parcel of land may be redistributed to the beneficiary. However, regardless of the quality of land, financial assistance should be provided to the beneficiaries.

4 The acquisition of agricultural land in India

4 1 Introduction

Different ways of acquiring agricultural land exist in India. India has made use of market-led approaches and expropriation to acquire land for land reform purposes.[289] This section briefly deals with the different ways of acquiring agricultural land in India.

4 2 Market-led approaches

Different States adopted different land purchase programmes.[290] The nature of land purchase programmes in India is voluntary.[291] However, the land purchase programmes differ from State to State with regard to *inter alia* (a) who initiates the purchase of land; (b) what amount of grant, if any, is provided to the beneficiaries for purchase of the land; (c) what the repayment terms are, if any, in relation to the total cost of the land purchased; and (d) who should establish a business plan and what should the business plan provide for.

[287] Appu *Land Reforms in India* 178. See also Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28. See further Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 250.
[288] See 3 2 6 above.
[289] See Chapter 5 above for an exposition of the approaches used in South Africa.
[290] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 255.
[291] 255.

Again, it is not possible to consider the different land purchase programmes of all Indian States. As explained, the focus remains on the State of West Bengal.

The land purchase programme in West Bengal focuses on providing house and/or garden plots to beneficiaries.[292] Beneficiaries under the land purchase programme[293] can choose whether to use the land allotted to them for housing needs and/or income-generating purposes such as farming or keeping livestock.[294] The programme in West Bengal is a State-driven process as opposed to a beneficiary-driven process. In this regard, the State initiates the land purchase act; identifies the parcel of land for acquisition; negotiates the price for the parcel of land and together with the beneficiary develops a business plan for farming the land.[295] While South Africa has followed both a demand-led and supply-led approach to acquiring agricultural land on the market,[296] this approach in West Bengal is similar to the supply-led approach followed in terms of the *PLAS* in South Africa.[297] According to Hanstad, the direct land purchase from *raiyats* by the State ensures that the public funds are utilised optimally.[298] Furthermore, West Bengal initiated a micro-finance programme to provide financial support to beneficiaries who acquired land under the land purchase programme.[299] Loans of up to 6000 rupees are available at an annual interest rate of 4%.[300]

4 3 Expropriation

While every Indian State has the authority to appropriate land situated within the limits of its jurisdiction for public utility or public purpose,[301] land has been subject to competing pressures, ranging from national development to food security.[302] Since the 1980's, the Indian economy has experienced a shift from small-scale/subsistence farming to large-

[292] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 255.
[293] Sections 49 and 49A of the West Bengal Land Reforms Act 10 of 1956.
[294] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 255.
[295] As opposed to a beneficiary driven process, where the beneficiaries, not the State officials, initiate the land purchase act. In this regard, beneficiaries identify the land; negotiate the price; and develop a business plan for farming the land. See Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 256.
[296] See Chapter 5, 2 3 and 2 4 above.
[297] See Chapter 5, 2 4 1 above.
[298] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 256.
[299] 256.
[300] 256.
[301] Article 298(i) of the Indian Constitution, 1950.
[302] A Rawat & U Narayan "Land acquisitions issues in India: Overview, critique and pragmatic suggestions" (2013) 9 *NUALS Law Journal* 56-76, 56.

scale/industrialised or commercial farming.[303] As a result, less focus is placed on the social function of agriculture in rural livelihoods and equality in ownership of land.[304] Sethi notes that industrialisation or commercialisation places a limit on national development programmes such as land reforms, which intensify "already existing inequalities in land distribution",[305] but is justified in light of the increases in agricultural output which has reduced India's national food-security concerns, given the ever-growing population.[306]

Accordingly, less priority was given to minimising the disparities in ownership of land among the landless. Instead, the focus fell on providing food security to the Indian population as a whole, through the industrialisation of various sectors, including the agricultural sector. However, the need to acquire land for large-scale commercial farming through expropriation, without causing large-scale displacement of persons living and/or working on agricultural land, had to be taken into account.[307] In this regard, the *NRR Policy* [308] aims to ensure the survival of displaced persons, but also to improve their standard of living by providing them with opportunities. Accordingly, the creation of job opportunities minimises the impact of the expropriation on displaced persons.[309]

The RFTLARRA[310] also provides for numerous mechanisms to ensure that land acquired for a public purpose such as industrialisation does not adversely affect the land owner and/or families living or working on the land. Rawat and Narayan explain that the RFTLARRA aims to strike a balance between a legitimate public purpose, such as expropriation for industrialisation, and appropriate compensation for displaced persons.[311] It may thus be necessary to look at a few aspects of the RFTLARRA which aims to redress the impact of expropriations on persons dependant on the land in question.

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[303] Sethi "Land reform in India: Issues and challenges" in *Promised Land: Competing Visions of Agrarian Reform* 78.
[304] 78.
[305] 77-78.
[306] Sethi "Land reform in India: Issues and challenges" in *Promised Land: Competing Visions of Agrarian Reform* (2006) 77-78; Rawat & Narayan (2013) *NUALS Law Journal* 56-57.
[307] Rawat & Narayan (2013) *NUALS Law Journal* 56.
[308] Government of India, Ministry of Rural Development, Department of Land Resource *The National Rehabilitation and Resettlement Policy*, 2007 (31 October 2007). See also Rawat & Narayan (2013) *NUALS Law Journal* 66.
[309] Preamble of the Government of India, Ministry of Rural Development, Department of Land Resource *The National Rehabilitation and Resettlement Policy*, 2007 (31 October 2007).
[310] See the Preamble of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013. The Land Acquisition Act, 1894 provided the framework for land acquisition, until it was finally repealed in 2013. See Rawat & Narayan (2013) *NUALS Law Journal* 67-68.
[311] Rawat & Narayan (2013) *NUALS Law Journal* 94.

In line with the *NRR Policy*, the RFTLARRA provides for a preliminary investigation to determine the social impact the acquisition of the land in question will have on the "affected family"[312] and the purpose of the acquisition.[313] The social impact assessment shall include (a) an assessment as to whether the proposed acquisition serves a legitimate public purpose; (b) an estimation of the affected families and the number of families among them likely to be displaced; (c) the extent of (public and private) lands, houses, settlements and other common properties likely to be affected by the acquisition; (d) whether the extent of land proposed for acquisition is the absolute bare minimum needed to fulfil the public purpose; (e) whether land acquisition at an alternate place has been considered and found not feasible; and (f) the nature and cost of addressing the impact *vis-à-vis* the cost of the project for a public purpose.[314] Accordingly, the impact of the acquisition[315] is weighed against the purpose of the acquisition,[316] before a decision is taken whether the land can or should be expropriated. Importantly, in light of the need to safeguard food security, the RFTLARRA also prohibits irrigated multi-cropped land from being acquired under the Act,[317] except in exceptional circumstances as a last resort.[318]

After a social impact assessment has been done and the decision to expropriate the land in question has been made, a preliminary notification with details indicating the land to be acquired must be published in the Official Gazette, two newspapers and uploaded to the website of the applicable State government.[319] The Act does not specify that the land owners must receive this notification. To determine the extent of the land to be acquired, the government may conduct a survey of the land.[320] A person interested in any land that has been notified as being required or likely to be required for a public purpose may object to

[312] Section 3(c) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[313] Sections 4-8 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[314] Section 4(4) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[315] Sections 4-7 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[316] Section 8 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[317] Section 10 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[318] Section 10(2) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[319] Section 11 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[320] Section 12 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.

inter alia (a) the area and suitability of land proposed to be acquired; (b) justification offered for public purpose; and/or (c) the findings of the social impact assessment.[321]

The RFTLARR also provides for the provision of a rehabilitation and resettlement scheme[322] that must include *inter alia* detail steps proposed to be taken by the State government; the amount of compensation payable to the land owner[323] and the affected family[324] respectively; the particulars of the house site and the house to be allotted to the affected family;[325] and details regarding the mandatory employment to be provided to the members of the affected family. The inclusion of this compulsory scheme ensures that land acquisition, rehabilitation and resettlement are all seen as equally important and inseparable from one another.[326] The RFTLARRA also provides for a National Monitoring Committee, which will be responsible for reviewing and monitoring the implementation of the rehabilitation and resettlement schemes.[327]

The provision of the social impact assessment, the rehabilitation and resettlement scheme and the overarching National Monitoring Committee may be important for the South African position where agricultural land is expropriated for land reform purposes to restrict the adverse effects of the acquisition on families or persons dependant on the land.

5 Reflection

5 1 The concept of agricultural land in India

India does not only provide for a category of agricultural land, but also stipulates what it is at national and State level. At national level agricultural land is defined in accordance with the purpose for which it is used. Accordingly, when determining what constitutes agricultural land, the focus does not fall on *where* the land is situated, but rather on the *purpose* for which it is used. Similarly, at State level, agricultural land is formulated in two ways: Either

[321] Section 15 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[322] Section 16 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[323] Sections 24-30 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[324] Section 31 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013 also provides for a Rehabilitation and Resettlement Award.
[325] Section 31(2) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[326] Rawat & Narayan (2013) *NUALS Law Journal* 69.
[327] Chapter 7 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.

as land used for agricultural purposes or land used for the purpose of agriculture. In light of the varied agricultural production and climatic conditions, each State provides for a different definition of what constitutes “agricultural purposes” or “agriculture”. The concept of agricultural land at both national and State level allows for situations where the nature and/or purpose of the land may change over time. For example, land may become arable over time due to changing climate conditions. Therefore, land that was previously deemed to be non-agricultural land, may become agricultural land. However, some States provide that agricultural land may also include land lying fallow for the time being. In such cases, only land which will never have an agricultural purpose again, may be regarded as non-agricultural land. For example, where land is acquired and developed to provide for a different purpose other than for “agriculture”, the land will constitute non-agricultural land.

Interestingly, West Bengal does not provide for a definition of “agricultural land”. Instead, for purposes of its land ceiling legislation, it provides for a definition of “land”, which may include agricultural land. Unlike other States where the legislation is only applicable to agricultural land, the aim of the WBLRA is to provide for a wider application of the ceiling legislation. In other words, in West Bengal, ceilings may be imposed on any land, including agricultural land.

5 2 The regulation of agricultural land in India

Ceiling legislation differs from State to State in relation to the (a) unit of application; (b) the classification of land; (c) exemptions from the ceiling legislation; (d) ceiling limit; (e) payment of compensation; and (f) who the beneficiaries are and what type of land rights are granted once they have acquired the ceiling-surplus land. In light of the widely differential approach to land ceilings, it is inevitable that some States would be more successful than others. In this regard, the reasons for the failure of the land ceilings legislation in some States are of particular importance.

West Bengal is identified as one of the States where the formulation and implementation of the land ceiling legislation was effective and successful in relation to the redistribution of ceiling-surplus land to beneficiaries. The insights drawn from the experience in West Bengal will be important for establishing a clearly formulated legal and institutional framework for land ceilings in South Africa.

The formulation of the legislation in West Bengal allowed for fewer gaps and/or loopholes which land owners (*raiyats*) could exploit. In this regard, the wide definition of land and fewer

exemptions prevented land owners from reclassifying their land to fall outside the scope and application of the ceiling legislation. The ceiling limit was also set lower, which meant that more land could be identified as ceiling-surplus land and redistributed. Furthermore, with regard to the implementation of the legislation, West Bengal is regarded as one of the States which implemented the ceiling legislation strenuously and timeously after the promulgation thereof. It was thus less likely for land owners to dispose of land that would be classified or identified as ceiling-surplus land by way of partitions and transfers.

While not completely up to date, the land records in West Bengal are for the most part complete. Accurate land records make it easier, in comparison to other States, to identify land owners and keep track of how much land has been redistributed. In this regard, the technological development linked to electronic land records contributed to expediency and accuracy. Without updated land records it would not be possible to measure the efficacy and success of the land ceiling legislation. Where land owners and the ceiling-surplus land of a particular land owner were identified, adequate and fair compensation was paid. This meant that land owners were more likely to participate and to provide or identity relevant parcels of land falling above the ceiling limit.

Once the ceiling-surplus land was obtained, the land in general, did not remain in the hands of the West Bengal State government. While other States opted to redistribute relatively large parcels of land to only a few families, West Bengal focused on redistributing smaller parcels of land to as many landless beneficiaries as possible.

Despite overcoming many of the failures in the formulation and implementation of the ceiling legislation experienced by other Indian States, West Bengal's post-redistribution support (financial and/or educational or otherwise) is problematic. Where the post-redistribution support is lacking, the totality of benefits that could have accrued to the beneficiaries are reduced.[328]

5 3 The acquisition of agricultural land in India

Different approaches to acquiring land, namely market-led approaches and expropriation, are employed in India and South Africa. While the market-led approaches appear to be

[328] Appu *Land Reforms in India* 178. See also Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28. See further Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 250.

similar to some of the market-led approaches adopted in South Africa,[329] some aspects incorporated into the expropriation legislation in India may become important for formulating South Africa's expropriation measures, particularly where expropriation is used for purposes of land reform.

For example, in India most people are dependent on the land for their livelihood. In this regard, where agricultural land is expropriated, the rehabilitation and resettlement of persons living and/or working on agricultural land is important to ensure that they are not deprived of their livelihood or that they are not rendered homeless. The social impact assessment and the creation of a compulsory rehabilitation and resettlement scheme under the RFTLARR provide for appropriate steps to ensure that people who are displaced as a result of expropriation will still have the necessary tools to support themselves and their families. Currently, the South African expropriation legislation does not provide for similar measures, as a detailed analysis will show later.[330] This may be an important consideration going forward.

6 Conclusion

While India and South Africa share a history of colonialism, characterised by extensive land appropriation,[331] which resulted in skewed land ownership patterns, these countries differ greatly in a number of respects, including population numbers, the amount of arable land available, climate and rainfall patterns. Notably, in both countries, land reform is difficult, time-consuming and expensive, but necessary.[332] In this regard, the respective countries' land reform programmes also differ greatly. As mentioned, South Africa undertook an overarching land reform programme consisting of three inter-connected pillars, namely: redistribution, restitution and tenure reform, embedded in section 25 of the Constitution, whereas India does not explicitly entrench its land reform programme in its Constitution. Furthermore, the Indian Constitution does not provide for the same level of protection of the right to property, in comparison to the South African Constitution.[333]

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[329] See Chapter 5, 2.
[330] See Chapter 9 below.
[331] Hanstad *et al* "Learning from old and new approaches to land reform in India" *Agricultural Land Redistribution: Toward Greater Consensus* 242-243.
[332] JM Pienaar "Willing-seller-willing-buyer and expropriations as land reform tools: What can South Africa learn from the Namibian experience?" (2018) 10 *Namibian Law Journal* 41-64.
[333] The right to property is a constitutional right in the Constitution of India, 1950 whereas it is a fundamental right under the Constitution of the Republic of South Africa.

Despite the differences, and while India faces its own difficulties with its land reform programme, South Africa can learn much from India regarding its formulation and implementation of its land ceiling legislation in particular. In this regard, the 2013 *ALPF*[334] identifies West Bengal of particular importance for the South African position in relation to the formulation and implementation of proposed ceilings legislation.[335] Accordingly, the focus fell on the experience in West Bengal, which has been identified as one of the States[336] that was most effective with its formulation and implementation of land ceilings and redistribution of agricultural land in India.[337]

Other aspects which may also improve the South African redistribution process are those measures found in the expropriation legislation dealing with the rehabilitation and resettlement of displaced persons where land is expropriated for a public purpose.

Accordingly, there is room for a comparative analysis between India and South Africa. However, as outlined, the aim of this Chapter is not to provide for a comprehensive comparative analysis of aspects and dimensions of redistribution in South Africa and India. Instead, this Chapter set out the legal position in India regarding: (a) the concept of agricultural land; (b) the mechanisms for the regulation of agricultural land, specifically the formulation and implementation of land ceiling legislation; and (c) the approaches and/or mechanisms for the acquisition of agricultural land. The Chapter then concludes with a reflection of the different aspects highlighted above, with respect to West Bengal in particular. As the necessary backdrop was provided in previous chapters, the next Chapter will provide for a comprehensive and comparative analysis between South Africa, Namibia and India regarding the concept of agricultural land, the mechanisms for the regulation of agricultural land and the approaches and/or mechanisms for the acquisition thereof.

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[334] Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013).
[335] See Chapter 3, 3 3.
[336] The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5 identifies West Bengal, Kerala and Jammu & Kashmir as achieving some measure of success with the implementation of its land ceiling policy, although the policy does not set out the basis for determining the success of the individual States; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework*: *Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247.
[337] See Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 4. See further Bandyopadhyay (2003) *Economic & Political Weekly* 879-884; Ghosh & Nararai (1978) *Social Scientist* 50-67; Sarkar (2007) *Economic & Political Weekly* 1435-1442 and Rawal (2008) *Economic & Politcal Weekly* 43-47.

Chapter 9: A Comparative perspective

1 Introduction

While previous chapters highlight that the relevant Constitutions and the particular historical context of land redistribution programmes may vary greatly from country to country, the insights drawn from other jurisdictions' experiences may expose the difficulties and failures in conceptualising, regulating, acquiring and redistributing agricultural land, and therefore have the potential to provide recommendations with regard to a proposed framework for the regulation, acquisition and redistribution of agricultural land within the South African constitutional context. A thematic methodology will be used to compare the legal position(s) pertaining to (a) the concept of agricultural land; (b) mechanisms for the regulation of agricultural land; (c) mechanisms or approaches for the acquisition of agricultural land; and (d) redistribution in South Africa, Namibia and India, as explained.[1]

The concept of "agricultural land" in South Africa and its implications for broadening access and redistribution is of critical importance. Accordingly, each jurisdiction's legal position pertaining to the concept of agricultural land will be discussed and compared first. Following such an exposition and comparison, the mechanisms for the regulation of agricultural land will be set out and discussed. As determined in other chapters,[2] the discussion is limited to the following mechanisms: (a) restrictions pertaining to the subdivision of agricultural land; (b) restrictions on the amount of agricultural land a person or entity may own; and (c) restrictions pertaining to ownership of agricultural land by foreigners. Importantly, when discussing these regulatory mechanisms the study does not aim to provide a fully-fledged comparative analysis. Instead, when comparing subdivision restrictions and restrictions on foreign ownership of agricultural land, the comparison is limited to the South African and Namibian positions. However, when comparing land ceilings, the comparison is limited to the South African and Indian positions. While India is an important comparative case study for land reform in general, it is their experience with land ceiling legislation and the consequent redistribution of surplus land to the poor, landless and marginal farmers that is of particular significance for the South African position. In this regard, Namibia does not provide for land ceiling legislation and will not contribute to that dimension. The Chapter then endeavours to compare and highlight aspects pertaining to the acquisition of agricultural

[1] See Chapter 1, read with Chapters 7 and 8.
[2] Chapter 1, 4 2.

land in Namibia and India which may be relevant for formulating policy and/or legislative measures in the South African context. The concluding section thereafter discusses the redistribution process and focusses on the following questions, namely: (a) who the beneficiaries ought to be; (b) how they ought to be selected; (c) what quantity of agricultural land they ought to receive and; (d) what type of rights the beneficiaries of the redistribution programme ought to receive. These aspects are accordingly discussed and compared in relation to the Namibian, Indian and South African positions.

2 The concept of agricultural land

2 1 Introduction

There is no uniform or single definition of agricultural land in South Africa.[3] This section explores how agricultural land is defined in Namibia, India and South Africa with the aim of developing the technical legal concept of agricultural land in South Africa.

2 2 Namibia

In Namibia, there is no statutory measure which provides for a single definition of agricultural land at an overarching level. Instead, three pieces of legislation, specifically aimed at regulating commercial agricultural land in Namibia, namely (a) SALA; (b) ALA and (c) ACLRA provide for different definitions of agricultural land. While it is clear from these pieces of legislation that a category of agricultural land exists, content to the concept of agricultural land is not provided.

Both SALA and ALA define agricultural land a residual category of land in Namibia. More specifically, SALA and ALA define agricultural land as “any land”,[4] and then lists categories of land that do not form part of the definition.[5] While agricultural land is defined as a category of land, it is still unclear what agricultural land is. Given the topography of Namibia, not all land defined as agricultural land for purposes of SALA or ALA will be or can be used for agricultural purposes. A strictly technical approach to the categories of land set out in SALA is thus insufficient for purposes of effective redistribution. The land that beneficiaries receive should be of such a quality that allows for large-scale; small-scale; or subsistence farming, depending on the needs of the beneficiary in question.

[3] See Chapter 2, 5 above.
[4] Section 1 of the Subdivision of Agricultural Land Act 70 of 1970.
[5] Section 1(a)-(f) of the Subdivision of Agricultural Land Act 70 of 1970.

ACLRA defines agricultural land as "any land or an undivided share in land".[6] It then, like SALA and ALA, lists a number of pieces of land excluded from the definition of agricultural land. It seems that any land owned by, or situated in, an area under the control of the State is excluded from the definition of agricultural land and consequently the operation of ACRLA. It also seems as if communal land, forming part of the property held in trust by the State, does not fall within the scope of the definition of agricultural land under ACLRA. Arguably, the operation of the ACLRA is limited to privately owned agricultural land. Similar to SALA, ACLRA provides that certain areas constitute agricultural land. However, unlike SALA, ACLRA provides some guidance on what agricultural land is. The Act refers to "agricultural land" and to "agricultural purposes"[7] separately. "Agricultural purposes" is defined widely and provides that it "includes game farming".[8] While ACLRA provides for some guidance on the concept of agricultural land, it does not provide for an overarching definition pertaining to all agricultural land in Namibia, because it only applies to private commercial agricultural land.

Following the second National Land Conference held in Namibia in October 2018, there have been no recent discussions or developments pertaining to the 2016 Land Bill.[9] However, the Land Bill may still provide insights into the conceptualisation of agricultural land. In this regard, the Land Bill aimed, *inter alia*,[10] to consolidate and amend ACLRA and the CLRA[11] to ensure that "all [agricultural] land in Namibia has the same status".[12] Accordingly, if ever promulgated, the Land Bill will replace both ACLRA and CLRA. With regard to the concept of agricultural land, the Land Bill provides for a new and simplified definition of agricultural land. The Land Bill therefore gives more content to what agricultural is, as opposed to where it may be situated. It defines agricultural land accordingly to the purpose for which it is used i.e. agricultural purposes,[13] although it does not provide an extensive list of what constitutes agricultural purposes. The Land Bill provides that "agricultural land" constitutes:

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[6] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[7] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[8] Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[9] The Land Bill B19-2016. S Likela "MPs yet to discuss AR 'land bill'" (23-07-2019) <https://www.namibian.com.na/81105/read/MPs-yet-to-discuss-AR-land-bill> (accessed 28-07-2019).
[10] Also see clause 3 of the Land Bill B19-2016 for a list of all the objectives of the Bill.
[11] W Werner "The 2016 Land Bill: Making law without consultation and policy review" (2017) *Democracy report Special Briefing Report No 16* 1-18 <https://ippr.org.na/wp-content/uploads/2017/02/Briefing_Land2017.pdf> (accessed 27-09-2019) 1, 6.
[12] Minister of Land Reform. (2016a). Motivation statement by the Honourable Utoni Nujoma, MP, Minister of Land Reform on the Land Bill. Ministry of Land Reform / National Assembly; Werner (2017) *Special Briefing Report No 16* 1.
[13] Clause 1 of the Land Bill B19-2016.

"[A]ny land or an undivided share in land that is used for agricultural purposes".[14]

The definition of "agricultural purposes" is formulated as follows:

"'[A]gricultural purposes,' includes game farming and aquaculture".[15]

This is not a closed list of agricultural purposes. Agricultural purposes may include land used for commercial and subsistence farming. Accordingly, agricultural land is not defined as a residual category as it is under SALA and ACLRA. The Land Bill provides for a move away from the formalistic or inflexible concept of agricultural land as a residual category and instead, advances an overarching or national definition of agricultural land.

2 3 India

Given India's federal government structure, a distinction may be drawn between national policy and legislation applicable to all States on the one hand,[16] and State-specific legislation in determining the concept of agricultural land, on the other. Accordingly, for purposes of land reform in general, varied concepts of agricultural land can be found in national policy and legislation and in State-specific legislation respectively.

India does not only provide for a category of agricultural land, but also stipulates what it is at national and State level. At national level, agricultural land is defined in accordance with the purpose for which it is used.[17] When determining what constitutes agricultural land, the focus does not fall on where the land is situated, but rather on the purpose for which it is used. Similarly, at State level, agricultural land is formulated in two ways: Either as land

[14] Clause 1 of the Land Bill B19-2016.
[15] Clause 1 of the Land Bill B19-2016.
[16] With the exception of section 1(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013, which provides that the Act extends to the whole of India except the States of Jammu & Kashmir.
[17] Section 3(e) of the Government of India, Ministry of Rural Development, Department of Land Resource *The National Rehabilitation and Resettlement Policy*, 2007 (31 October 2007) and section 3(d) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.

used for "agricultural purposes"[18] or land used for the purpose of "agriculture".[19] In light of the varied agricultural production and climatic conditions, each State provides for a different definition of what constitutes "agricultural purposes" or "agriculture". The concept of agricultural land at both national and State level allows for situations where the nature and/or purpose of the land may change over time. For example, land may become arable over time due to changing climate conditions. This may mean that land that was previously deemed to be non-agricultural land, may become agricultural land, or *vice versa*. However, some States provide that agricultural land may also include land lying fallow for the time being.[20] In such cases, only land that will never have an agricultural purpose again, may be regarded as non-agricultural land. This would be the case where land, which was previously arable, is acquired and developed to provide for a different purpose other than for "agriculture". The land will consequently be defined as non-agricultural land.

Interestingly, West Bengal does not provide for a definition of "agricultural land" in its ceiling legislation. Instead, it provides for a definition of "land" [21] only, which may include agricultural land. In this way the ceiling legislation provides for a wide application, in comparison to other States, because ceilings may be imposed on *any land*, including agricultural land.

2 4 South Africa

The Regulation Bill[22] specifically states that "there is a need to redistribute *agricultural land* more equally by race and class"[23] (own emphasis) to broaden access to agricultural land[24] in order to address the "inequalities in relation to agricultural land ownership and land use".[25] This necessitates the determination of what constitutes agricultural land in South Africa.

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[18] Section 3(f) of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 2(10) of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 3(g) of the Haryana Ceiling on Landholding Act 26 of 1972; section 3(f) of the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; section 2(9) of the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; Section 2(18) of the Karnataka Land Reforms Act 10 of 1962; section 2(k) of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 2(14) of the Orissa Land Reforms Act 16 of 1960; section 3(5) of the Punjab Land Reforms Act 10 of 1973; section 3(22) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961.

[19] Section 3(j) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 2(f) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 2(3) of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978.

[20] Section 2(b) of the West Bengal Estates Acquisition Act 1 of 1954.

[21] Section 2(7) of the West Bengal Land Reforms Act 10 of 1956.

[22] The Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.

[23] Preamble of the Regulation of Agricultural Land Holdings Bill.

[24] Section 25(5) of the Constitution of the Republic of South Africa, 1996; preamble of the Regulation of Agricultural Land Holdings Bill.

[25] HJ Kloppers & GJ Pienaar "The historical context of land reform in South Africa and early policies" (2014) 17 *Potchefstroom Electronic Law Journal* 677-706, 677. See also S Tsawu *An historical overview and evaluation of the sustainability of the LRAD programme in SA* LLM, Stellenbosch University (2006) 1-2 and JM Pienaar *Land Reform* (2014) 375.

"Agricultural land" is defined differently in a variety of legislative measures, for different purposes, as is evident from the analysis of the SALA, the Preservation Bill,[26] read with the *Draft Preservation Policy*[27] and the Regulation Bill in Chapter 2 above. Because the definition of agricultural land differs within each context, there is the need to provide clarity in respect of which land specifically will be affected under which regulatory measure.

In terms of SALA, agricultural land is not specifically defined. Instead, agricultural land is defined as a residual category of land. SALA provides that agricultural land constitutes "any land", except those categories of land listed in the legislation.[28] After dealing with various conflicting judgments in Chapter 2 pertaining to the interpretation of "agricultural land" in SALA,[29] it was found that the category of "agricultural land" still exists. However, it is still unclear what agricultural land is. Other legislative and policy measures may provide more clarity regarding what agricultural land is in South Africa.

Although under consideration to be redrafted, the Preservation Bill[30] and the corresponding *Draft Preservation Policy* may provide some insight into the concept of agricultural land in South Africa.[31] As mentioned above, if promulgated, it will also repeal SALA. As set out in Chapter 2,[32] the *Draft Preservation Policy*[33] contains a rather different definition of agricultural land to that provided for in the Preservation Bill. The *Draft Preservation Policy* not only defines agricultural land in relation to the purpose for which it is used, but also provides for sub-classification of agricultural land, including "unique agricultural land";[34] "high value agricultural land";[35] and "medium value agricultural land."[36] The sub-classification is determined with reference to the "land capability".[37] In this regard, the *Draft*

[26] GN 984 *GG* 40247 of 02-09-2016.
[27] GN 210 *GG* 38545 of 13-03-2015 5.
[28] Section 1 of the Subdivision of Agricultural Land Act 70 of 1970; G Frantz *Repealing the Subdivision of Agricultural Land Act: A constitutional analysis* LLM thesis, Stellenbosch University (2010) 30. The definition of "agricultural land" was substituted by section 1 (a) of the Subdivision of Agricultural Amendment Act 55 of 1972 and also by Proclamation R100 of 31 October 1995.
[29] See Chapter 2, 2 2 above.
[30] Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016.
[31] The definitions of agricultural land in both versions of the Bills (the Preservation and Development of Agricultural Land Framework Bill (draft) in GN 210 *GG* 38545 of 13-03-2015 and the Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016) are similar, and almost identical. Accordingly it is only necessary to discuss the definition in the 2016 version of the Bill.
[32] See Chapter 2, 3 2 above.
[33] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) in GN 210 *GG* 38545 of 13-03-2015.
[34] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 7.
[35] 5.
[36] 6.
[37] 5.

Preservation Policy makes provision for eight land capability classes.[38] While the Preservation Bill proposes to update the definition of agricultural land, it still, like SALA, defines agricultural land as a residual category.[39] Accordingly, the Preservation Bill, like SALA, ALA and ACLRA, provides for a category of agricultural land, but does not provide *content* to the concept of agricultural land. In summation, the *Draft Preservation Policy* defines agricultural land in relation to the purpose for which it is used, whereas the Preservation Bill defines agricultural land as a residual category of land. The implication of this difference in classification for purposes of the redistribution programme is reflected on below.

Interestingly, while "agricultural land" is defined as a residual category of land in the Preservation Bill, the Bill also provides for "unique agricultural land"[40] and also distinguishes between "high potential cropping [or agricultural] land"[41] and "medium value agricultural land"[42] with reference to the different "land capability classes"[43] as set out in the *Draft Preservation Policy*. Although the definition of agricultural land in the *Draft Preservation Policy* and Preservation Bill differs substantially, the definitions may still be reconcilable and may provide for a clear concept of agricultural land. The Preservation Bill identifies geographical areas that constitute agricultural land within South Africa, by excluding certain areas from its definition.[44] Therefore, the Preservation Bill, like SALA, outlines the parameters of agricultural land in South Africa. The *Draft Preservation Policy* describes specifically what these geographical areas of land as demarcated through the operation of the definition of agricultural in the Preservation Bill are or may be used for.[45] In this light, the definitions of agricultural land set out in the Policy and Bill are reconcilable. If revised and promulgated, the Preservation Bill, read with the *Draft Preservation Policy*, may provide for a clear and overarching or national concept of agricultural land in South Africa, namely certain demarcated land used for agricultural purposes.

[38]Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 6.
[39] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[40] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[41] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[42] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[43] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[44] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[45] Department of Agriculture, Forestry and Fisheries, *Draft Preservation and Development of Agricultural Land Policy* (2015) 5.

Similarly to SALA, the Regulation Bill defines agricultural land as a residual category of land[46] but does not provide more clarity on the content of the concept of agricultural land. However, the exclusions listed in SALA and the Regulation Bill differ substantially. When SALA and the Regulation Bill are compared it is clear that there is no uniform or single definition of what constitutes agricultural land. Accordingly, no clear, single definition of agricultural land emerges when comparing SALA and the Regulation Bill. However, when the definitions of agricultural land as defined in the Preservation and Regulation Bill are compared, it is clear that the definitions are similar and almost identical and capable of providing a clear and uniform indication of what constitutes agricultural land in South Africa. Accordingly, if it is assumed that the Preservation Bill (read with the *Draft Preservation Policy*) will commence and replace SALA, as envisaged, then the definition of agricultural land for purposes of this dissertation may constitute the following: Any private or public land in South Africa used for agricultural purposes, except (a) land in a township; (b) land zoned for non-agricultural purposes in terms of any legislation; and (c) land excluded by the Minister by notice in the *Government Gazette*.

2 5 Reflection

Until such time as the Regulation Bill and Preservation Bill are promulgated, the definition of agricultural land as set out in SALA remains operational. This definition only provides for agricultural land as a residual category of land. In principle, defining agricultural land as a residual category means that more agricultural land is available for redistribution. However, such a definition does not take into account the *purpose* for which the land may be used. For example, not all land falling into this category may be capable of being used for agricultural purposes. Accordingly, in line with the land needs and demands of the beneficiaries, the purpose for which the land will be used must also be taken into consideration when defining agricultural land for purposes of redistribution.

Under SALA, agricultural land constitutes certain demarcated areas of land in South Africa. Agricultural land is defined in accordance with where it is situated, and not with regard to the purpose for which it can or will be used. However, if the Regulation Bill and Preservation Bill, read with the *Draft Preservation Policy*, are promulgated, these legislative and policy measures will provide for a wider definition of agricultural land in South Africa, which takes

[46] Clause 1 of the Regulation of Agricultural Land Holdings Bill.

into account the purpose for which the land may be used. This has clear implications for extending the scope of land available in principle for redistribution.

In comparison, in Namibia there is a move away from the concept of agricultural land as an inflexible residual category of land. If the Land Bill is promulgated, it will provide for a uniform, national definition of agricultural land, namely any land, private or public, used for agricultural purposes. Agricultural purposes may be defined widely to include private and public (or communal) land used for commercial or subsistence farming or grazing. Similarly, at a national level, India's legislative measures provide for a wide definition of agricultural land, such as land used for "agricultural purposes" or land used for the purpose of "agriculture". However, each State, given its specific climatic conditions and land capabilities, provides a different list of agricultural purposes or for a definition of "agriculture".

If the Regulation Bill and the Preservation Bill (read with the *Draft Preservation Policy*) are promulgated together, agricultural land may be regarded as any private or public land in South Africa, used for or capable of being used for agricultural purposes, except for (a) land in a township; (b) land zoned for non-agricultural purposes in terms of any legislation; and (c) land excluded by the Minister by notice in the *Government Gazette*. Accordingly, such an interpretation provides for a national or overarching concept of agricultural land in South Africa. Given South Africa's topography and current and/or changing climatic conditions, it may be further proposed that each province, similar to a State in India, provide in legislation or policy, what constitutes "agricultural purposes" for that region. The details pertaining to what constitutes "agricultural purposes" are then left to the relevant provincial legislator or policy maker.

3 Mechanisms for the regulation of agricultural land

3 1 Introduction

There are various mechanisms that provide for the regulation of agricultural land. However, as mentioned throughout this dissertation, the focus falls on the following regulatory mechanisms specifically: (a) subdivision restrictions; (b) land ceilings; and (c) restrictions relating to foreign ownership of agricultural land as measures that either restrict or promote the redistribution of agricultural land.

When comparing subdivision restrictions and restrictions on foreigners disposing of or acquiring agricultural land, the comparison will be restricted to the position in South Africa

and Namibia. As mentioned above, India is an important comparative case study for land reform in general. However, it is their experience with land ceiling legislation specifically, and the consequent redistribution of surplus land to the poor, landless and marginal farmers, that is of particular significance for the South African position. Importantly, as set out in Chapter 8,[47] the only regulatory mechanism discussed for the regulation of agricultural land in India is the use of land ceilings. Because Namibia does not provide for land ceilings it will not contribute to the discussion on land ceilings as measures to regulate agricultural land. Accordingly, when comparing the imposition of land ceilings, the comparison will be restricted to the position in South Africa and India.

3 2 Restrictions on the subdivision of agricultural land in Namibia and South Africa

Both South Africa and Namibia use SALA, which prohibits the subdivision of agricultural land in principle.[48] The prohibition is, however, not absolute. Agricultural land may still be subdivided where ministerial consent is obtained. The underlying reason for placing restrictions on the subdivision of agricultural land in both countries is to prevent the uneconomic fragmentation of agricultural land or to protect the economic viability of agricultural land. Where land is fragmented, it poses a risk to the economic viability and capacity in relation to the productivity of the land. It is argued that a decrease in the productivity of the land as a result of fragmentation could ultimately impact negatively on food security.[49]

In Namibia, given the scarcity of arable land, a national policy on subdivision of agricultural land was also formulated. In this regard, the 2018 *National Policy on Subdivision and Consolidation of Agricultural Land*[50] aims to prevent agricultural land from diminishing into uneconomical and ecologically non-sustainable land units.[51] As mentioned in Chapter 7,[52] the Policy provides for strategies to promote and ensure the sustainable existence of agriculture for current and future generations in Namibia, namely: (a) setting a minimum size of agricultural land units;[53] (b) placing restrictions on the subdivision of agricultural land; (c) consolidating agricultural land units; (d) evaluating agricultural land productivity; and (e)

[47] See Chapter 8, 3 above.
[48] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970.
[49] Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018) 2, 4.
[50] 2, 4.
[51] 2, 4.
[52] See Chapter 7, 3 2 2 above.
[53] Interestingly, Namibia thus prosposes “floor” legislation for agricultural land, as opposed to “ceiling” legislation as proposed in South Africa.

restricting the use of high potential soils for the use of non-agricultural activities.[54] In other words, the Policy advocates for a "floor" limit, as opposed to a "ceiling" limit in South Africa,[55] for the regulation of agricultural land.

In comparison, there is no national policy on subdivision of agricultural land in South Africa. However, the Preservation Bill, which will replace SALA if promulgated, will also prohibit the subdivision of agricultural land without prior consent from the Minister.[56] The aims of this Bill are more complex and encompassing in comparison to the aims of SALA. While the Bill, like SALA, aims to prevent the subdivision of agricultural land into uneconomic parcels, it also aims to promote the preservation and sustainable development of agricultural land; identify protected agricultural areas; put in place measures to promote long-term viable and resilient farming units; provide for mitigating measures to counteract the increasing loss of agricultural land and set up a National Agricultural Land Registry.[57] However, as mentioned in Chapter 3,[58] the development of other legislative instruments, namely the Regulation Bill, resulted in the announcement by the Minister of Agriculture, Forestry and Fisheries that this Bill will be reconsidered and redrafted.

In contrast to SALA and the Preservation Bill, Act 126 provides that agricultural land may be subdivided where land is acquired for redistribution purposes. The underlying reason for subdivision in this regard is to ensure that it does not act as a constraint to the State's mandate to redistribute agricultural land. Similarly, ACLRA also provides that the Minister of Lands, Resettlement and Rehabilitation may subdivide agricultural land into holdings for the redistribution thereof to persons for purposes of small-scale farming.[59] Accordingly, where agricultural land is concerned, two opposing positions motivated by different legislative aims exist.

[54] Ministry of Agriculture, Water and Forestry *National Policy on Subdivision and Consolidation of Agricultural Land* (March 2018) 5-7.
[55] See Chapter 3, 3 3 above.
[56] Clause 19 of the Preservation and Development of Agricultural Land Bill.
[57] Preamble of the Preservation and Development of Agricultural Land Bill.
[58] See Chapter 3, 3 2 2 2 above.
[59] Section 38 of the Agricultural (Commercial) Land Reform Act 6 of 1995.

3 3 Restrictions on the amount of agricultural land an owner may own in India and South Africa

Land ceiling legislation adopted and implemented by all the States in India placed limitations (or ceilings) on the amount of agricultural land a person or family could own.[60] In comparison, the Regulation Bill provides for an envisaged framework which also provides for restrictions on the amount of agricultural land an individual or entity may own. Given the history of dispossession in India, the underlying reason for the imposition of land ceilings is to ensure a more equal distribution of agricultural land between the wealthy and the poor. Accordingly, there is a need to redistribute land more equally by class. In comparison, as a result of past discriminatory practices, the underlying reason for the possible imposition of land ceilings is also to ensure a more equal distribution of agricultural land among South African citizens. However, where there is no connection with race where redistribution of agricultural land is concerned in India, race is a pivotal factor in the South African context when redistributing agricultural land. Therefore, as also reiterated by the Regulation Bill, there is the need to redistribute agricultural land more equally by race and class.[61]

While the underlying reason for the imposition of land ceilings in India is clear, the land ceiling legislation generally did not live up to its expectations.[62] As mentioned in Chapter 8,[63] the imposition of ceilings has generally not led to any effective redistribution of agricultural land, but instead, aggravated India's existing problem of uneconomical fragmented land holdings, which has led to a general decline in agricultural productivity.[64] Accordingly, insights can be drawn from the reasons for the failure of land ceiling legislation on the one hand and implications of such failure, on the other. For comparative purposes, the focus falls on the experience in West Bengal, which is identified as one of the States where the formulation and implementation of the land ceiling legislation was effective and successful in relation to the redistribution of ceiling-surplus land. The insights drawn from the experience in West Bengal will be important for possibly establishing a clearly formulated legal and institutional framework for land ceilings in South Africa.

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[60] NC Behuria *Land Reform Legislations in India: A Comparative Study* (1997) 166-183; PS Appu *Land Reforms in India: A Survey of Policy, Legislation and Implementation* (1996) 140, 144. See Chapter 8, 3 2 1 above.

[61] Preamble of the Regulation of Agricultural Land Holdings Bill.

[62] T Hanstad, R Nielsen, D Vhugen & T Haque "Learning from old and new approaches to land reform in India" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.

[63] See Chapter 8, 3 3 above.

[64] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.

3 3 1 Reasons for failure of land ceiling legislation

Ceiling legislation differs from State to State in relation to the formulation of (a) the unit of application;[65] (b) the classification of land; (c) exemptions from the ceiling legislation; (d) ceiling limit; (e) payment of compensation; and (f) who the beneficiaries are and what type of land rights are granted to them once they have acquired the ceiling-surplus land. In light of the widely differential approach to land ceilings, it is inevitable that some States would be more successful than others. Despite some exceptions,[66] the imposition of land ceilings was largely ineffective and unsuccessful for redistribution purposes.[67] According to various authors,[68] the ineffective use of the land ceiling legislation can be attributed to various factors or considerations, discussed in more detail below. These considerations are of particular significance for proposing a clearly formulated legal and institutional framework for land ceilings in South Africa. In this regard, the Regulation Bill, in its current form, may require further amendments.

3 3 1 1 The formulation of the ceiling legislation

The definition of land or agricultural land, the unit of application;[69] the classification of land; the number of exemptions; the ceiling limit and the retrospectivity of the legislation, are important aspects when formulating land ceiling legislation. In essence, the specific formulation of ceiling legislation in India allowed land owners to circumvent the provisions and application thereof.[70] Accordingly, the position in West Bengal and South Africa in relation to these aspects will be set out below.

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[65] The ceiling may be applicable to an individual or a family as a unit.

[66] According to, T Hanstad & J Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) 112 *Rural Development Institute Reports on Foreign Aid and Development* 4, West Bengal comprises only 3.3% of the land in India, but it is responsible for 20% of the redistribution of surplus-ceiling land. The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5 policy identifies West Bengal, Kerala and Jammu & Kashmir as achieving some measure of success with the implementation of its land ceiling policy. See also Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in Agricultural Land Redistribution: Toward Greater Consensus 246-247.

[67] Appu *Land Reforms in India* 178; Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5; C Ashokvardhan *Ceiling laws in India* (2005) 9, 15.

[68] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246; Behuria *Land Reform Legislations in India* 132.

[69] The ceiling may be determined with reference to an individual unit or a family unit, depending on the particular State's ceiling legislation. See 3 3 1 1 1 below.

[70] Sethi "Land reform in India: Issues and challenges" in *Promised Land: Competing Visions of Agrarian Reform* (2006) 75.

3 3 1 1 1 The unit of application

Land ceiling legislation defines the size of land that an individual or family can own. The "unit of application" must thus be understood in relation to the determination of the ceiling limit. Depending on the particular State's ceiling legislation, the ceiling limit may be determined and applied in relation to an "individual unit" or a "family unit".[71] Accordingly the unit of application refers to the calculation of the ceiling limit relative to an individual or family, as a unit.

In terms of the unit of application, the State of West Bengal initially determined that the ceiling should apply to individual landholders.[72] However, subsequent to the recommendations in the 1972-guidelines, West Bengal changed the unit of application to "family" holdings. If the ceiling limit is applied to each family member as an individual unit, less land is available for redistribution. In contrast, when the ceiling limit is calculated in relation to a family unit instead, more land becomes available for redistribution purposes. For example, a family consisting of five members and constituting a unit will be allowed to keep less land, than if the ceiling limit is applied in relation to the family members as individual units or holders.

The ceiling legislation in West Bengal provides for a concept of family, limited to five members to constitute a unit.[73] By way of contrast, the Regulation Bill provides that the ceiling should apply to individual private and public land owners, including natural, juristic and foreign persons, and not to a family unit or holding. Arguably, it would be too difficult to formulate a standardised concept of "family"[74] in South Africa or to limit the number of family members to five to constitute a unit or holding.

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[71] Before 1972, the basis for determining the ceiling limit was an individual as a unit, as opposed to a family. Following the 1972-guidelines, it was recommended that a "family" be considered as the unit of application for land ceilings.

[72] K Venkutasubramanian "Land reforms remain an unfinished business" (2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm> (accessed 11 January 2019).

[73] Behuria *Land Reforms Legislation in India* 133.

[74] See for example, *Hattingh v Juta* 2012 5 SA 237 (SCA) para 17 and *Hattingh v Juta* 2013 3 SA 275 (CC) para 34, referring to *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 31 where the court held that families come in different shapes and sizes. These cases highlight the difficulty forming a concept of "family" within the South African context.

3 3 1 1 2 The classification of land

With regard to the classification of land,[75] some Indian States classified their land into different classes[76] or according to a "standard acre".[77] In light of the fact that South Africa is not a federal state, it would be sufficient to classify agricultural land, as defined by each province,[78] in accordance with a "standard hectare".[79] To illustrate, in terms of the WBLRA, a "standard hectare" in relation to agricultural land is, equivalent to (a) 1.00 hectare in an irrigated area and (b) 1.40 hectares in any other area.[80] In relation to any other land, including land comprised in an orchard, a standard hectare is equivalent to 1.40 hectares.[81] Furthermore, the Regulation Bill provides for the consideration of land capability factors, such as different classes of land, including, high, medium and unique agricultural land when determining the ceiling limit. This means that the specific classification of land may guide and ultimately restrict the ceiling limit.

3 3 1 1 3 The definition of (agricultural) land

The inadequate definition of agricultural land allowed land owners to re-classify their land to fall outside the scope of ceiling legislation, thereby circumventing it.[82] In comparison to other States, West Bengal adopted a very wide definition of "land",[83] as opposed to "agricultural

[75] Behuria *Land Reform Legislations in India* 166-183.
[76] For example, in Andhra Pradesh, before the 1972-guidelines were imposed, a family holding was defined to be equal to either 6 acres of class A land; 8 acres of class B land; 10 acres of class C land etc.See sections 3(d), 3 (e) and 3(v) of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; section 12 of the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; section 4 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; section 2(6) of the Gujarat Agricultural Lands Ceiling Act 27 of 1961; section 2(1) the Jammu & Kashmir Agrarian Reforms Act 17 of 1976; schedule 1, part A of the Karnataka Land Reforms Act 10 of 1962; sections 2(10); 2(11); 2(24); 2(38) and 2(41) read with section 82 of the Kerala Land Reforms Act 1 of 1964; section 2(f) of the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; section 2(5-a) read with section 2(13) of the Orissa Land Reforms Act 16 of 1960; section 4 of the Punjab Land Reforms Act 10 of 1973; section 4 of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; schedule 2 of the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; section 2(40) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; section 2(11) of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978 and section 14(K)(f) of the West Bengal Land Reforms Act 10 of 1965.
[77] Because an acre is a measure of area, not length, it is defined in square feet. The size of a one "standard acre" is equal to 4,840 square yards, which is equal to 4,047 square metres, which in turn is equal to 43,560 square feet is equal or 0.405 hectares.
[78] As proposed at 2 5 above.
[79] A "standard hectare" is an accepted metric system unit of area equal to a square with 100-metre sides, or 10,000 m^2, and is primarily used in the measurement of land. There are 100 hectares in one square kilometre. An acre is about 0.405 hectare and one hectare contains about 2.47 acres.
[80] Section 14K(f)(i) of the West Bengal Land Reform Act 10 of 1956.
[81] Sections 14K(f)(ii) and (iii) of the West Bengal Land Reform Act 10 of 1956.
[82] Hanstad & Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development* 26; T Besley & R Burgress "Land Reform, Poverty Reduction and Growth: Evidence from India" (2000) 115 *The Quarterly Journal of Economics* 389-430, 394.
[83] Section 2(7) of the West Bengal Land Reforms Act 10 of 1956. See 2 3 above.

land", which prevented land owners from reclassifying their land and thus circumventing the legislation.[84] By way of comparison, the Regulation Bill in South Africa is only applicable to agricultural land, defined as a residual category of land.[85] Accordingly, the Regulation Bill applies to all land, except those areas excluded from the definition of agricultural land, even where the land cannot be used for agricultural purposes. Given the wide definition of agricultural land in the Regulation Bill specifically, it will be less probable for land owners to argue that their land falls outside the scope of the legislation and therefore less likely for land owners to circumvent the provisions of the Regulation Bill. This wider definition of agricultural land will also ensure that more land is available in principle for redistribution.

3 3 1 1 4 The exemptions

Apart from the formulation of the definition of land, Indian States also allowed for a number of exemptions in the land ceiling legislation.[86] West Bengal is one of the States with the smallest number of exemptions, which resulted in more land (not only agricultural land) being available for redistribution.[87] While there are no listed exemptions in the Regulation Bill, the Bill provides that "the Minister may determine special categories of ceilings and exempt a particular category of agricultural land holding"[88] from the operation of the land ceilings. In this regard, the Regulation Bill does not provide for guidelines or criteria for determination of special categories or exemptions. The Regulation Bill also specifically provides that "institutional funds that own agricultural land holdings portions of which constitute" ceiling surplus land, may by way of application to the Minister be exempted from the provisions dealing with land ceilings.[89] Importantly, the Minister has the discretion to exempt particular categories of land or institutional funds from the operation of the ceiling legislation, subject to an application procedure.

[84] Besley & Burgress (2000) *The Quarterly Journal of Economics* 389, 394.
[85] See 2 4 above.
[86] See Chapter 8, 3 2 3 above. See also Behuria *Land Reforms Legislation in India* 132; Appu *Land Reform in India* 154; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 15, 28.
[87] See Chapter 7, 3 2 3 above.
[88] Clause 25(1)(c) of the of the Regulation of Agricultural Land Holdings Bill.
[89] Clause 26(4)(a) of the of the Regulation of Agricultural Land Holdings Bill. According to the Regulation Bill, "Institutional Funds" includes "investment funds, pension funds, hedge funds that invest or trade in agricultural land and related derivatives in their use of agricultural land as an asset class".

3 3 1 1 5 The ceiling limit

Ceiling limits in India were set too high in relation to the average household operational holdings to have much of an impact on the agrarian sector.[90] The higher the ceiling the less land could be identified as ceiling-surplus land, which also resulted in less land being available for redistribution.[91] As explained, compared to other States, West Bengal from the outset provided for a low ceiling, applicable to all land, in its legislation which may have contributed to more successful and effective redistribution of land.

Chapter 7 of the Regulation Bill provides for the categories of ceilings for agricultural land holdings. The provisions relating to determining the land ceilings are challenging.

The wording of the Regulation Bill in its current format in relation to the determination of agricultural land ceilings is very clear: Different categories of land ceilings may be determined for different districts and regions.[92] While the point of departure is thus that various regions and areas will be approached differently, there is still no certainty regarding precise ceilings. Exact ceilings for each district are to be announced by notice in the *Government Gazette*, by the Minister, after consultation.[93] As mentioned above, the Minister has the discretion to determine special categories of ceilings and may also provide for exemptions of particular categories of land holdings.[94] For the determination of ceilings for agricultural land holdings for each district, regard must be had to "such criteria and factors as may be prescribed".[95] The following criteria and factors are listed: (a) land capability factors (essentially high, medium or unique agricultural land,[96] matters pertaining to production output, variations in physical potential in terms of soil type, and the relationship between resources); (b) capital requirements of different enterprises; (c) measure of expected household and agro-enterprise income; (d) annual turnover; (e) relationship between product prices and price margins; and (f) any other matter as may be prescribed.[97]

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[90] R Mearns "Access to land in rural India: policy issues and options" *World Bank Policy Research Working Paper 2123* (May 1999) 10; Behuria *Land Reforms Legislation in India* 132.
[91] See Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28.
[92] JM Pienaar "Land Reform: January to March" (2017) 1 *Juta Quarterly Review* 1-8, 3; clause 25(1) of the Regulation of Agricultural Land Holdings Bill.
[93] Clause 25(1) of the Regulation of Agricultural Land Holdings Bill.
[94] Clause 25(1)(c) of the Regulation of Agricultural Land Holdings Bill.
[95] Clause 25 (2) of the Regulation of Agricultural Land Holdings Bill.
[96] These concepts are not defined in the Regulation of Agricultural Land Holdings Bill.
[97] Clause 25 of the Regulation of Agricultural Land Holdings Bill in; Pienaar (2017) *JQR* 3.

In summation, there is no standard ceiling applicable to all agricultural land in South Africa. Instead, the ceiling limit is determined per district or region, having regard to the various criteria and factors prescribed above. It remains to be seen what the ceiling limit, per district or region will be in South Africa. In line with the approach in West Bengal, the ceiling should be low, rather than high, provided that the criteria and factors listed in the Regulation Bill for the determination of the ceiling limit allow for it.

3 3 1 1 6 The retrospective effect

In general, land ceiling legislation in India did not provide for prohibiting transfers retrospectively.[98] Accordingly, in anticipation of the implementation of land ceiling legislation, land owners resorted to partitions and fictitious transfers to circumvent the legislation.[99] In this regard, only the States of Gujarat and West Bengal provided for the retrospective effect of the land ceiling legislation. Other States only banned transfers after the implementation of the ceiling law.[100] For example, in West Bengal the legislation provides that land transferred by sale, gift or otherwise partitioned by a *raiyat* after the 7th of August 1969, but before the publication of the West Bengal Land Reform (Amendment) Act, 1971 shall be taken into account in determining the ceiling area, as if the land had not been transferred or partitioned.[101] The Act also provides that this provision shall not apply to *bona fide* transfers or partitions and that the onus of proving such a transfer or partition shall lie with the transferor.[102] Furthermore, the transfer or partition will be deemed to be *mala fide* if the transfer or partition was made in favour of the transferor's relatives.[103]

The Regulation Bill, in its current form, does not provide for prohibiting transfers retrospectively. The Regulation Bill only provides that "any agreement to acquire or dispose of agricultural land is void, in so far as it purports to exclude, or to limit, any provision of this Act"[104] *from the date of commencement of the Act*. It may be pivotal for the effective and successful use of land ceilings to include a provision in the Regulation Bill that prohibits the transfer of agricultural land retrospectively. The question remains from what date the

[98] For an exposition of the States which provided for land ceiling legislation with retrospective effect, see Behuria *Land Reforms Legislation in India* 184-211.
[99] Behuria *Land Reforms Legislation in India* 132.
[100] 132.
[101] Section 14P(1) of the West Bengal Land Reforms Act 10 of 1956.
[102] Section 14P(2) of the West Bengal Land Reforms Act 10 of 1956.
[103] Section 14P(2) of the West Bengal Land Reforms Act 10 of 1956 provides that relatives are regarded as the transferor's wife, husband, child, grand child, parent, grandparent, brother, sister, brother's son or daughter, sister's son or daughter, daughter's husband or son's wife, wife's brother or sister, brother's wife.
[104] Clause 3(2) of the Regulation of Agricultural Land Holdings Bill.

legislation should operate retrospectively. Other South African land reform legislation may provide guidance pertaining to the retrospective date for the operation of the Regulation Bill. For example, the Land Reform (Labour Tenants) Act 3 of 1996 was assented to on 22 March 1996. However, "to protect labour tenants who might have been evicted or who might have suffered a reduction of rights in anticipation of the enactment of the Act"[105] the Act has retrospective effect to allow protection for persons who were labour tenants on 2 June 1995.[106] This date marks the date on which the Labour Tenants Bill was first published for comment. Similarly, the Regulation Bill in relation to the operation of land ceilings specifically, may provide that it operates retrospectively from the date it was published for comment, namely on 17 March 2017. In this way, the land transferred from the date 17 March 2017 to the date of commencement of the Regulation Bill shall be taken into account in determining the ceiling area, as if the land had not been transferred.[107] The Regulation Bill should also, like the WBLRA, provide for *bona fide* transfers. This may prevent land owners from resorting to *mala fide* partitions and fictitious transfers of agricultural land, before the promulgation and implementation of the Regulation Bill.

3 3 1 2 The implementation of the land ceiling legislation

The reluctance of Indian States to implement land ceilings vigorously, is regarded as another reason for the failure of land ceiling legislation.[108] Various reasons for the States' reluctance may be highlighted, including: (a) lack of political will on the part of the States;[109] (b) administrative delays given the tedious processes set out in the ceiling legislation for acquiring and disposing of the ceiling-surplus land; and/or (c) land disputes in courts dealing with the classification of land and determining whether the land constitutes ceiling-surplus land.[110] However, the determination of fair compensation, which was calculated differently

[105] M Cowling, D Hornby & L Oettlé *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa: Research Report on the Tenure Security of Labour Tenants and Former Labour Tenants in South Africa* (June 2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Tenure_Security_AFRA.pdf> (accessed 04-08-2019) 5.
[106] Section 3(1) of the Land Reform (Labour Tenants) Act 3 of 1996.
[107] Section 14P(1) of the West Bengal Land Reforms Act 10 of 1956.
[108] Sethi "Land reform in India: Issues and challenges" in *Promised Land: Competing Visions of Agrarian Reform* 75; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.
[109] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247-248.
[110] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 25 provides that the absence of a common adjudicatory body and uniform procedure is leading to complexities and delays in the settlement of land disputes. See also Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27.

by each State, could not be challenged in the courts[111] and therefore could not and did not contribute to the delay in the implementation of land ceiling legislation. The amount of compensation is also discussed below as a proposed and separate reason for the failure of land ceiling legislation in India.[112]

As explained, West Bengal is regarded as one of the States that administered and implemented its land ceiling legislation effectively.[113] Furthermore, in light of the resolution of land disputes by the civil courts which follow strenuous procedures and may be time-consuming and costly, the WBLRA bars the jurisdiction of civil court in almost all matters dealt with in the Act.[114] Instead, the disputes between *raiyats* or between the *raiyats* and the government are decided by the revenue officers.[115] Appeals may be brought before the District Land and Land Reforms Officer or any other senior officers appointed or allocated for the purpose of hearing appeals.[116] Therefore, the particular forum for disputes is prescribed resulting in: (a) a specialised fixed forum; and (b) a less complex and time-consuming dispute resolution process.

In light of the above, South Africa requires an effective land administration system characterised by (a) a strong political will on the part of the executive, specifically the DALRRD to implement and monitor compliance with land ceiling legislation; (b) a clear and effective administrative process, governed by a competent body for the acquisition and redistribution of ceiling-surplus land; (c) an effective mechanism for resolving land disputes timeously dealing with *inter alia* the classification of land and determining whether the land

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[111] Article 31C of the Constitution of India, 1950.
[112] See 3 3 1 4 below.
[113] According to, T Hanstad & J Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Reports on Foreign Aid and Development, Report No. 112* 1-66 4, West Bengal comprises only 3.3% of the land in India, but it is responsible for 20% of the redistribution of surplus-ceiling land. The Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 5 policy identifies West Bengal, Kerala and Jammu & Kashmir as achieving some measure of success with the implementation of its land ceiling policy, although the policy does not set out the basis for determining the success of the individual states; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27; Department of Rural Development and Land Reform, *Agricultural Land Holding Policy Framework: Setting upper and lower bands for the ownership and use of agricultural landholdings* (July 2013) 14; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-247 Just check, but I think this fn appears in two other places
[114] Sections 34 and 61 of the West Bengal Land Reforms Act 10 of 1956.
[115] Section 53A of the West Bengal Land Reforms Act 10 of 1956. See also LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 16.
[116] Section 54 of the West Bengal Land Reforms Act 10 of 1956. See also LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 16 which states that an aggrieved party may approach the Land Reforms Tenancy Tribunal against the decisions of the appellate authority and the decision of the Tribunal can be challenged before the Division Bench of the High court earmarked for this purpose.

constitutes ceiling surplus land and the determination of just and equitable compensation; and (d) sufficient capacity and resources to undergird the relevant mechanisms.

The Regulation Bill makes provision for a Land Commission, which must oversee the administrative process regulating the acquisition and redistribution of ceiling-surplus land.[117] As mentioned in Chapter 3 and below,[118] co-operation between the Land Commission and other departments and offices, such as the DALRRD;[119] the Office of the Registrar of Deeds and the OVG will be required to ensure an effective administrative process. However, as mentioned already, it is still unclear *when* and to *what extent* the OVG will be involved in the redistribution process. Currently, the Regulation Bill does not provide for a dispute resolution mechanism for resolving land disputes. It is unclear whether the Land Claims Court ("LCC")[120] will have jurisdiction to resolve land disputes under the Regulation Bill or whether parties may resort to alternative dispute resolution. In the absence of any guidance pertaining to dispute resolution mechanisms, land owners will have to approach the courts to resolve land disputes which may delay the implementation of land ceiling legislation and the overall redistribution process. However, newly appointed Justice Minister Ronald Lamola announced that he planned to bring a draft Land Court Bill to Parliament, to help govern the adjudication of land restitution claims, expropriation and redistribution.[121] At this point it is unclear whether the LLC may be transformed into the new "Land Court".

Such a newly constituted specialised Land Court could adjudicate on the categorisation of agricultural land and whether certain land is exempted from the operation of the Act and the determination of compensation for ceiling-surplus land. Accordingly, the Court may deal with

[117] Chapter 2 of the Regulation of Agricultural Land Holdings Bill.
[118] See 3 3 1 2 read with 3 3 1 3 below.
[119] On the 29th of May 2019, President Ramaphosa announced the appointment of a reconfigured national executive following the general elections <https://www.gov.za/speeches/president-cyril-ramaphosa-announces-reconfigured-departments-14-jun-2019-0000> (accessed 15-08-2019). The Minister of Agriculture, Land Reform and Rural Development is responsible for the newly reconstituted Department of Agriculture, Land Reform and Rural Development (DALRRD). This is a new department arising from a merger between the Department of Agriculture, Forestry and Fisheries (DAFF) and the Department of Rural Development and Land Reform (DRDLR).
[120] There is a Court Bill apparently underway, nit is has not at the time of writing been published for comment yet.
[121] G Davis "Modernising SA Courts among Lamola's top priorities" <https://ewn.co.za/2019/07/03/moderinising-sa-courts-among-ronald-lamola-s-top-priorities> (accessed 04-08-2019). See also Address by Minister Ronald Lamola, MP Minister of Justice and Correctional Services at the occasion of the budget debate of the Office of the Chief Justice, July 2019, National Assembly, Cape Town (17 July 2019) <https://www.gov.za/speeches/budget-debate-office-chief-justice-17-jul-2019-0000> (accessed 04-08-2019).

disputes related to the redistribution of agricultural land, which in turn, may ensure that a less complex and time-consuming dispute resolution process is followed.

In general, the inadequate formulation of the land ceiling legislation in relation to its retrospectivity and untimely implementation of the ceiling legislation gave land owners time to dispose of land that would fall above the ceiling limit, by resorting to partitions and transfers as mentioned above.[122] For example, land owners would resort to *benami* transactions[123] to dispose of surplus land or gift the land among relations, friends and dependents.[124] The disposal of surplus land to relations, friends and dependents, by way of *benami* transactions, not only made less land available for redistribution, but it was also difficult to determine who the true owner of the property, specifically (agricultural) land was. Accordingly, the act of monitoring the type of transactions conducted is also integral in the legislation's success or not. These types of transactions also contributed towards inaccurate or incomplete land records, which is also regarded as one of the reasons for the failure of land ceiling legislation in India.

As explained, in South Africa, SALA prohibits the subdivision or partition of agricultural land, without the written consent of the Minister of Agriculture, Forests and Fisheries. Accordingly, the provisions of SALA, read with the Regulation Bill, may restrict owners from subdividing and subsequently transferring portions of their agricultural land to relations, friends and dependents to circumvent the provisions of the Regulation Bill. Before the reconfiguration of the national executive on the 29th of May 2019, co-operation between the different departments, namely the DRDLR and the DAFF, would have been required to ensure that land owners, before the commencement of the Regulation Bill, did not subdivide and transfer ceiling-surplus land to relations, friends and dependents to circumvent the Regulation Bill. However, in light of the newly constituted DALRRD (which arises from a merger between the DAFF and the DRDLR), it may be more difficult to circumvent the aims of the Regulation Bill.

3 3 1 3 The lack of accurate and updated land records

The effective delivery of land rights to citizens is absolutely dependent on an efficient, secure and cost-effective deeds registry system. The lack of accurate and updated land records in

[122] Appu *Land Reforms in India* 154; Government of India, Ministry of Rural Development, Department of Land Resources, *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28, 148.
[123] See Chapter 8, 3 3 above for a discussion of *benami* transactions.
[124] Appu *Land Reforms in India* 154.

India is regarded as a major constraint on the effective implementation of ceiling legislation.[125] Poor record-holding not only makes it difficult to identify the land owners (or *raiyats*), but it also poses difficulties in calculating or considering whether the legislation has been successful.[126] In West Bengal, the Land Information System has three distinct divisions, i.e. (a) cadastral map;[127] (b) record of rights;[128] and (c) registration of conveyance instruments for transfer of land and mortgages. The cadastral map and the record of rights are prepared by the Land and Land Reforms Department, while the registration of deeds for transfer of land and mortgages is administrated by the Finance Department.[129] The State has the obligation to maintain and update land records resulting from transfer or inheritance.[130] The effectiveness of the ceiling legislation will be improved provided that the State takes appropriate and effective steps in continuously maintaining and updating the land records when land is transferred to beneficiaries under the Act.[131] In 1990 West Bengal started digitizing the record of rights[132] and is the first State to integrate digitized cadastral maps with related record of rights.[133] In this regard, the State has recently amended the WBLRA to facilitate e-delivery of land records through affixing digital signatures.[134] This has

[125] Mearns "Access to land in rural India: Policy issues and options" *World Bank Policy Research Working Paper 2123* (1999) 10; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247, 259; Government of India, Ministry of Rural Development, Department of Land Resources, *Draft National Land Reforms Policy* (18 July 2013) 28 suggests that the States should hold inventory of surplus land. See also Government of India, Ministry of Rural Development, Department of Land Resources, *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 40.

[126] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247, 259.

[127] The Bengal Tenancy Act 1885 for the first time provided the legal basis for preparation of revenue village maps following the method of cadastral survey. On the basis of such maps the records of rights were prepared.

[128] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14 explains that the record of rights contained particulars relating to each tenant or occupant of the land or sharecropper, the name of each tenant's or occupant's landlord, classification and quantity of land of each tenant etc. The record of rights were revised in the 1950's under the West Bengal Estate Acquisition Act 1 of 1954. Revision of record of rights was again taken up in 1975 under the West Bengal Land Reforms Act 10 of 1956, and is not complete yet in respect of all the administrative districts of the State.

[129] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 13-14.

[130] Section 50 of the West Bengal Land Reforms Act 10 of 1956.

[131] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14.

[132] Accordingly to the LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14, the record of rights are completely digitized except those of 1473 odd revenue villages of three districts. Those records are expected to be completed within a short period of time.

[133] LGAF Team, Landesa "Improving land governance in West Bengal" (2014) *State Report: Land Governance Assessment Framework* 14.

[134] Section 50(2) of the West Bengal Land Reforms Act 10 of 1956.

enhanced speed of service delivery to a great extent and has contributed to the effective implementation of the ceiling legislation.

To ensure the effective implementation of the Regulation Bill in South Africa, accurate and updated land records are required. To this end, the Regulation Bill provides for the establishment of a Land Commission.[135] As mentioned in Chapter 3, the Land Commission shall serve as the principal body to oversee the collection and dissemination of all information regarding ownership of public and private agricultural land[136] and will consequently develop and maintain a register of agricultural land holdings in order to monitor the distribution and redistribution of agricultural land.[137] Chapter 4 of the Regulation Bill requires land owners to disclose their present ownership and acquisition of ownership in respect of private agricultural land. Similarly, Chapter 5 of the Regulation Bill provides that the relevant accounting officer, in relation to public agricultural land, must submit details regarding the ownership and acquisition of public agricultural land. These disclosures and the land register will enable the government to monitor and evaluate its compliance with the constitutional directive to ensure land, tenure and related reforms.[138] It will also make it easier to determine at what pace and to what extent redistribution of agricultural land has taken place in South Africa. Accordingly, in principle, the establishment of a land register is pivotal to the successful implementation of the land ceiling legislation. However, various concerns arise pertaining to the effective implementation of the Regulation Bill, including whether the Land Commission will have the technical ability to administer such a registry sufficiently and accurately.

The creation of the register will be a monumental task equivalent to trying to recreate a significant portion of the existing Deeds Registry, while updating the register continuously and simultaneously. One reason for this task is to determine how much land the State owns and has available for redistribution. Although both the Land Commission and the Office of the Registrar of Deeds fall under the newly constituted DALRRD, it is unclear how the redistribution process will be reconciled with South Africa's existing land registration process in terms of the Deeds Registries Act 47 of 1937.[139] No provision is made specifically for the

[135] See Chapter 3, 3 3 3 1 2.
[136] Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017 37.
[137] See clause 8 of the Regulation of Agricultural Land Holdings Bill where the functions of the Land Commission are set out.
[138] Clause 2 of the Regulation of Agricultural Land Holdings Bill.
[139] The Deeds Registries Act 47 of 1937 regulates all aspects of the registration of deeds and the office and duties of the Registrar of Deeds.

cooperation between the Office of the Land Commission; the Office of the Registrar of Deeds and the OVG[140] in the Regulation Bill in relation to the transfer of ownership. For example, it is questioned whether the register created by the Land Commission will replace the Deeds Registry wholly, partially or not at all, in light of the fact that the creation of the registry will recreate a significant portion of the existing Deeds Registry. It is also unclear what the responsibilities of the Land Commission and the Registrar of Deeds are in relation to the consolidation or subdivision of agricultural land.

Recently, in September 2019, the President assented to the Electronic Deeds Registration Systems Act 19 of 2019. This Act aims to provide for the development, establishment and maintenance of an electronic deeds registration system[141] ("e-DRS") to administer, digitize and expedite the registration of deeds to ensure a more efficient and cost effective deeds registration process. Apart from the cooperation between the Land Commission and the Office of the Registrar of Deeds, cooperation with the Department of Agriculture, Land Reform and Rural Development is also required where agricultural land is subdivided and transferred.

3 3 1 4 The lack of adequate or fair compensation

The amount of compensation paid to land owners in India[142] for ceiling-surplus land, made the programme unpopular with land owners, which in turn led to land owners using loopholes and gaps in the legislation discussed above.[143] It is postulated that the prohibition against challenging the manner in which the amount of compensation is determined and/or the amounts awarded to land owners in a court of law also contributed to the use of loopholes and gaps in the legislation.[144] As mentioned above, the WBLRA provides that the amount of

[140] Recent case law in the Land Claims Court has highlighted this lacuna. *Moloto Community v Minister of Rural Development and Land Reform*, unreported, case no LCC 204/2010, 4 February 2019, Land Claims Court, Randburg <http://www.justice.gov.za/lcc/jdgm/2019/2019-lcc-204-2010.pdf> (accessed 11-09-2019) and *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019). From these two judgments it is clear that clarity regarding the impact of the Property Valuation Act remain unaddressed. Further clarification, specifically in jurisprudence is needed regarding the exact scope of the Act; when the Act must be used and at what stage of the expropriation process; and what the relationship, duties and responsibilities of courts *vis-á-vis* the Office of the Valuer-General and Property Valuation Act are.

[141] Section 2 of the Electronic Deeds Registration Systems Act 19 of 2019.

[142] Mearns "Access to land in rural India: Policy issues and options" *World Bank Policy Research Working Paper 2123* (May 1999) 10; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247.

[143] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.

[144] Article 31C of the Constitution of India, 1950.

compensation shall be equal to fifteen times the land "revenue"[145] or its equivalent assessed for such land.[146] Furthermore, where such land revenue or its equivalent has not been assessed or is not required to be assessed, an amount calculated at the rate of 135 rupees for an area of 0,4047 hectare automatically applies.[147] Generally, the amount of compensation is lower than market value.[148]

In terms of the Regulation Bill, the Minister may, in accordance with the legislation regulating expropriation, expropriate the ceiling-surplus land if the owner of the ceiling-surplus land and the Minister are unable to reach an agreement on the purchase price.[149] Compensation, in line with the Constitution in its current form, must be just and equitable and may be higher or lower than market value, depending on the circumstances of each specific case.[150] In contrast to the position in India, the amount of compensation may also be challenged in court[151] which may further contribute to the tedious and time-consuming redistribution process and the slow pace of land reform in general. However, recent developments indicate that the Constitution may be amended to expressly provide for expropriation without compensation in certain cases.[152] In this regard, the Draft Expropriation Bill of 2019 discussed in Chapter 6,[153] provides for categories of land which *may* be expropriated for land reform purposes, for nil compensation depending on the circumstances namely: (a) land occupied or used by labour tenants; (b) land held purely for speculative purposes; (c) land owned by a State-owned corporation or entity; (d) abandoned land; and (e) where the "market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land".

In this context, land owners may contest that their land falls outside the scope of such categories. Land owners are also entitled to challenge the amount of compensation, by way of mediation or in court.[154] Importantly, a challenge to the amount of compensation paid to the land owner will not affect the vesting of ownership in the expropriating authority.[155]

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[145] Section 3(11) defines "revenue" as that which is lawfully payable or deliverable in money or in kind or both by a *raiyat* under the provisions of the Act in respect of the land held by him or her. See also Chapter 4 of the West Bengal Land Reforms Act 10 of 1956 for other provisions relating to revenue.
[146] Section 14V of the West Bengal Land Reforms Act 10 of 1956.
[147] Section 14V of the West Bengal Land Reforms Act 10 of 1956.
[148] Ashokvardhan *Ceiling Laws in India* 19; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.
[149] Clause 26(1)(c) of the Regulation of Agricultural Land Holdings Bill.
[150] Section 25(3) of the Constitution of the Republic of South Africa, 1996.
[151] Section 25(2)(b) of the Constitution of the Republic of South Africa, 1996.
[152] See Chapter 5, 3 3 2 above.
[153] See Chapter 5, 3 2 3 4.
[154] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[155] Clause 21 of the Regulation of Agricultural Land Holdings Bill.

Accordingly, the redistribution of agricultural land to beneficiaries may continue, regardless of whether there is a dispute regarding the amount of compensation paid. While the redistribution process may be more affordable in theory and contribute to the overall efficacy of the redistribution programme, it does not mean that the process will be less complex or more efficient.

3 3 1 5 The lack of actual redistribution

Where ceiling-surplus land was identified and acquired in India, it generally remained in the hands of the State government.[156] Land can only be regarded as redistributed once it has been allotted and transferred to the intended beneficiaries.[157] The lack of redistribution of ceiling-surplus land accordingly, also contributes to the success or failure of the implementation of the ceiling legislation in different States.

In terms of the Regulation Bill, acquired ceiling-surplus land ("redistribution agricultural land") must first be offered to Black persons.[158] In this regard, there is a general concern that many Black people may not be able to exercise their right of first refusal, because they may not have the necessary financial resources.[159] It is noteworthy that the Regulation Bill does not have any provisions dealing with financial assistance to Black people wishing to acquire the ceiling-surplus land. Instead, these provisions are set out in different policies, discussed in Chapter 5.[160]

Where Black persons fail to exercise their right of first refusal, the redistribution agricultural land must be acquired by the State.[161] The ceiling-surplus land will thus remain in the hands of the State and will still need to be redistributed. However, the Bill is silent on the procedure of redistribution once land has been acquired by the State. Presumably, in line with the preamble and the aims of the Regulation Bill, the State will acquire the land with a view to ultimately transfer the agricultural land to land reform beneficiaries. However, the Regulation Bill does not provide for a precise definition of beneficiaries or how the beneficiaries will be determined. The determination of the beneficiaries should either be set out in the regulations

[156] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246. See Government of India, Ministry of Rural Development, Department of Land Resources, *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27.
[157] See also Chapter 1, 2 2 above for the concept of redistribution in South Africa.
[158] Clause 26(2)(a) of the Regulation of Agricultural Land Holdings Bill.
[159] See Chapter 3, 3 3 3 2 2 above.
[160] See Chapter 5, 2 3 – 2 5 above.
[161] Clause 26(2)(b) of the Regulation of Agricultural Land Holdings Bill.

or in policy.[162] Such regulations or policy must provide for (a) the identification of beneficiaries; and (b) the types of land rights to be acquired by them. Furthermore, the Regulation Bill does not have provisions regulating instances where the Minister does not want to acquire the redistribution agricultural land,[163] for example, when the land does not meet the developmental or planning objectives.[164]

Moreover, the Minister is also unlikely to transfer any of it into the ownership of emergent Black farmers[165] as this would conflict with the SLLDP[166] of 2013. Under this SLLDP,[167] emergent Black farmers settled on land acquired by the State for redistribution purposes are confined to leasehold tenure and cannot easily obtain individual title. Black subsistence farmers are expected to remain perpetual tenants of the government.[168] Large-scale Black farmers with the capacity for commercial production must lease their farms for 30 years, and thereafter for another two decades.[169] Only after 50 years have passed may these farmers purchase these farms. In the interim, their leases may be terminated at any time for what the SLLDP describes as a lack of "production discipline".[170] In this regard, the Regulation Bill and SLLDP may not assist in redistributing (in the sense of providing ownership) of agricultural land to Black people. The implementation of the Regulation Bill and the SLLDP may bring about a system that closely resembles nationalisation.[171]

The effective redistribution of agricultural land is therefore dependent on the transfer of ownership or land use to identified beneficiaries.[172] In this regard, the South African government should: (a) provide financial assistance to Black persons wanting to acquire ceiling-surplus land in terms of the Regulation Bill; (b) provide guidelines or criteria according to which "replacement" beneficiaries may be identified where no Black person exercises their right to first refusal to acquire ceiling-surplus land; and (c) transfer ownership of the

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[162] See Chapter 5, 2 3 – 2 5 where the different policies pertaining to the redistribution of land is set out.
[163] Pienaar (2017) *JQR* 4.
[164] 4.
[165] South African Government, "State of the Nation Address" (20 June 2019) <https://www.gov.za/speeches/2SONA2019> (accessed 28-07-2019). In President Cyril Ramaphosa's State of the Nation Address, he reiterates the promise to provide funding to emerging farmers.
[166] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (25 July 2013) 12-21.
[167] See Chapter 5, 2 4 2 above.
[168] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013) 12-21.
[169] 12-21.
[170] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013) 25; R Hall "What's wrong with government's state land lease & disposal policy, and how can it be remedied?" Institute for Poverty, Land, and Agrarian Studies, PLAAS Position for National Land Tenure Summit, 2014: State Land Lease and Disposal Policy, 8 September 2014.
[171] See Chapter 5, 2 4 2.
[172] See Chapter 1, 2 2 above where the distinction between redistribution and access to land is highlighted.

land, in line with the concept of redistribution,[173] to the identified beneficiaries in a timely manner. These actions may contribute to the success of the implementation of the Regulation Bill in South Africa.

3 3 1 6 The quantity and the quality of redistributed agricultural land

A distinction needs to be drawn between (a) the quantity of land redistributed and the number of beneficiaries who receive the land on the one hand, and (b) the quality of land redistributed and the number of beneficiaries on the other hand.

Where land was redistributed, the Indian States distributed the land in relatively large parcels, which meant that only a small percentage of landless families benefitted.[174] In such cases, more ceiling-surplus needs to be available for redistribution to benefit a larger number of beneficiaries.

Unlike most States, West Bengal focused on distributing ceiling-surplus land to as many landless families as possible, instead of aiming to provide each beneficiary with a large farm.[175] While the ceiling-surplus land was redistributed in relatively small parcels, it is unclear whether the quality of land was of such a nature for the beneficiaries to cultivate the land.[176] Accordingly, it is unsurprising that many beneficiaries, once they received land of questionable quality for cultivation purposes, would want to sell and transfer it. However, some States completely prohibit beneficiaries from transferring ownership of the agricultural land when acquired,[177] whereas other States prohibit transfer of ownership for a period of time only (ranging from 10-20 years).[178] In West Bengal, no time period is attached to this prohibition and therefore it is unclear whether the beneficiary or his/her heirs may be allowed to sell the land in future once it is acquired.

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[173] See Chapter 1, 2 2 above.
[174] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246, 255.
[175] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247-249.
[176] Appu *Land Reforms in India* 178. See also Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28. See further Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 250.
[177] See for example, section 49(1A) of the West Bengal Land Reforms Act 10 of 1956.
[178] Behuria *Land Reforms Legislation in India* 143; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.

The Regulation Bill provides that each region must take into consideration, *inter alia*, the land capability factors and climatic conditions to determine the ceiling limit.[179] Depending on the ceiling limit, a variety of parcels of agricultural land, differing in size; type and/or quality will become available for redistribution. However, the Bill is silent on how much land and what type and/or quality of agricultural land will be redistributed to the beneficiaries. It is also unclear what type of land rights, namely ownership or land use rights, beneficiaries will acquire in relation to the agricultural land. Presumably, these details will be canvassed in regulations.

It is opined that the quantity of the land to be redistributed should be determined by the quality of the ceiling-surplus land. Where the land is dry or arid, a larger parcel of land may be redistributed to a beneficiary, given the particular regional considerations. However, where the land is or can be irrigated or is fertile, a smaller parcel of land may be redistributed to the beneficiary. Regardless of the quality of land, financial assistance should be provided to the beneficiaries in principle. In light of the distinction between "redistribution" and "access to land",[180] the type of land right acquired in relation to the ceiling-surplus agricultural land also needs to be determined, either in the regulations to the Regulation Bill or in policy.

3 4 Restrictions related to foreign ownership of agricultural land in Namibia and South Africa

Ownership of agricultural land by foreign nationals is subject to regulatory restrictions in many countries. In this regard, policy objectives associated with such restrictions generally include: preventing foreign-based speculation in land; controlling the amount and direction of direct foreign investment; ensuring local control over food production and food security; promoting local or national interests and endeavours to benefit the local population; and indirectly controlling immigration.[181] A spectrum of restrictions exist: Restrictions range from specific bans on foreign ownership of land to requirements that notice of foreign ownership be given to the relevant authority.[182]

The Namibian Constitution specifically provides that the legislator may "prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian

[179] Clause 25 of the Regulation of Agricultural Land Holdings Bill.
[180] See Chapter 1, 2 2 above.
[181] J Glass, R Bryce, M Combe, NE Hutchison, MF Price, L Schulz & D Valero "Research on interventions to manage land markets and limit the concentration of land ownership elsewhere in the world" (2018) *Scottish Land Commission, Commissioned Report No 001* 1-62, 15.
[182] Glass *et al* (2018) *Scottish Land Commission, Commissioned Report No 001* 15.

citizens".[183] ACLRA provides that no "foreign nationals"[184] or nominee[185] may acquire or occupy[186] agricultural land without the prior written consent of the Minister.[187]

Given the historical dispossession of agricultural land by foreigners and the consequent need to redistribute agricultural land to previously disadvantaged Namibian citizens, the primary underlying reason for these restrictions is to ensure that agricultural land is available for acquisition by citizens. A secondary underlying reason would be to prevent foreign-based speculation in land and controlling the amount and direction of direct foreign investment in Namibia.

Accordingly, the acquisition of ownership of agricultural land by a foreign national is subject to an approval process set out in the Act. Importantly, this process does not place an absolute prohibition on the acquisition of agricultural by foreigners. Instead, ACLRA provides for criteria which must be satisfied for the Minister to grant approval for the acquisition of ownership by a foreign national.[188]

The proposed 2016 Land Bill places a twofold prohibition on the acquisition of agricultural land by foreign nationals. In terms of this Bill, a foreign national will in general not be able to acquire ownership of agricultural land,[189] unless the foreign national falls within one of the exemptions.[190] The Bill does not only restrict the acquisition of ownership of agricultural land by foreign nationals, but also restricts foreign nationals from acquiring a right to occupy and use agricultural land. In terms of the Bill foreign nationals may obtain the right to occupy and use agricultural land or a portion thereof by way of lease.[191] Accordingly, the Land Bill provides for a general prohibition relating to land rights – ownership, occupation or use.

However, the acquisition of such a right is subject to a further restriction, namely written approval of the Minister.[192] Similar to the provisions of ACLRA,[193] there are also specific

[183] Article 16(2) of the Constitution of Namibia, 1990.
[184] Sections 1 read with 58 and 59 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[185] Section 59 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[186] *Marot v Cotterell* 2012 1 NR 365 (HC) para 3.
[187] Section 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[188] See Chapter 7,3 3 2 above. Secton 58(6)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[189] Clause 114 of the Land Bill B19-2016; Werner "The 2016 Land Bill: Making law without consultation and policy review" (2017) *Democracy Report Special Briefing Report No 16* 13.
[190] Clause 115 of the Land Bill B19-2016. See Chapter 7, 3 3 3 above.
[191] Clause 114(3) of the Land Bill B19-2016.
[192] Clause 114(3) of the Land Bill B19-2016.
[193] Section 58(6) of the Agricultural (Commercial) Land Reform Act 6 of 1995.

conditions or criteria which a foreign national must fulfil before the Minister may approve the lease.[194] Furthermore, the lease may only be:

> "for a period of 10 years at a time renewable or for a fixed period of less than 10 years, but which is renewable, and it being a condition of such agreement that the right of occupation of the land concerned may not exceed a period of 10 years in total, renewable for another maximum of 10 years at a time".[195]

The Bill does not provide for a limitation on how many times a foreign national may renew the lease where the lease is for a period of 10 years. In general, it is unclear for what period overall a foreign national may lease agricultural land.

In comparison, there are currently no restrictions on foreigners or citizens acquiring or disposing of agricultural land in South Africa. However, the operation of the Regulation Bill aims to change this position. In this regard, the Regulation Bill provides for (a) restrictions on the amount of agricultural land a foreign national or citizen may own; (b) restrictions on the disposal of agricultural land by foreign nationals; and (c) a prohibition on the acquisition of ownership of agricultural land in future.

In light of the mandate set out in section 25(5) of the South African Constitution, namely to broaden access to land for citizens specifically, the underlying reason for these restrictions related to foreign ownership of agricultural land is to ensure that more land is available for acquisition by citizens and to ensure that it remains in the hands of citizens. The underlying reason for the restrictions on foreigners in South Africa and Namibia is thus the same. For this reason, the Regulation Bill provides that where foreigners intend to dispose of their agricultural land, it must first be offered to the Minister, in the prescribed manner.[196] The Minister has a right of first refusal to acquire ownership of the relevant parcel of land for redistribution purposes.[197] The right of first refusal mechanism in effect and indirectly allows the Minister to (a) obtain agricultural land for redistribution in order to support and promote productive employment and income to poor and efficient farmers; and to (b) ensure redress for past imbalances in access to agricultural land.[198] In this regard, the right of first refusal

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[194] Clause 114(6) of the Land Bill B19-2016. See also Werner "The 2016 Land Bill: Making law without consultation and policy review" (2017) *Democracy Report Special Briefing Report No 16* 1-18. See Chapter 7, 4 3 5 above where these criteria are discussed.
[195] Clause 114(3) of the Land Bill B19-2016.
[196] Clause 21(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[197] Clause 21(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[198] See clause 3 of the Regulation of Agricultural Land Holdings Bill.

given to the government serves as a mechanism aimed at making more land available for acquisition and redistribution purposes. Where the Minister exercises the right of first refusal,[199] the land should be redistributed to selected Black beneficiaries.[200] If the Minister does not express an intention to acquire the agricultural land holding or indicates that he or she is not going to take up the offer, the foreign person must make the land available for acquisition by "citizens" on the open market.[201] Accordingly, the agricultural land may not be sold to another foreign person on the open market. The Bill does not specify whether the agricultural land must be offered to previously disadvantaged citizens. However, the Regulation Bill ensures that agricultural land will, at the very least, be transferred to citizens.

Apart from the restrictions imposed on foreigners pertaining to the disposal of agricultural land, the Regulation Bill also prohibits foreigners from acquiring ownership of agricultural land once the Bill is promulgated.[202] Accordingly, foreign persons who are currently agricultural land owners will retain their ownership of the land once the Act commences. Importantly, this provision does not aim to extinguish a foreign person's ownership of agricultural land. The Regulation Bill only prohibits foreigners, in relation to future acquisitions of agricultural land, from becoming owners thereof. Accordingly, the provision *prima facie*, does not infringe the right to property.[203] While the Regulation Bill restricts the acquisition of ownership of agricultural land, it does not prevent foreigners from obtaining *access* to agricultural land.[204] In future, foreigners may obtain access and use of agricultural land by way of long-term leases.[205] Ordinarily, the period of a long-term lease (*in longum tempus*)[206] is a minimum of ten years or longer.[207] However, in terms of the Regulation Bill a lease must be entered into between the foreign person and the State for a minimum of 30

[199] Clause 26(2)(a) of the Regulation of Agricultural Land Holdings Bill.
[200] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013).
[201] Clause 21(2)(b) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[202] Clause 19(1) of the Regulation of Agricultural Land Holdings Bill; Pienaar (2017) *JQR* 3.
[203] This is because section 25(1) of the Constitution of the Republic of South Africa, 1996 only entrenches negative protection of property and does not expressly guarantee the right to acquire, dispose or hold property. See also *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
[204] Pienaar (2017) *JQR* 3.
[205] Clause 20(1) of the Regulation of Agricultural Land Holdings Bill.
[206] S Viljoen *The Law of Landlord and Tenant* (2018) 52-54, 111 provides that it is important to distinguish between registered and unregistered long-term leases. Registered leases, in terms of the Deeds Registries Act 47 of 1937, create limited real rights that are enforceable against third parties. In other words, long-term tenants are protected for the full term of the lease against successor in title and all creditors, provided that the lease is registered against the title deed of the leased property. However, the rights of unregistered long-term tenants, as regulated by the Formalities in Respect of Leases of Land Act 18 of 1969, are more contested.
[207] See the definition of "immovable property" in the Deeds Registries Act 47 of 1937 and section 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969. See also Viljoen *The Law of Landlord and Tenant* 52-54, 111.

years, which may be renewed, provided that the period does not amount to more than 50 years.[208]

Therefore, two aspects are important: (a) the Regulation Bill does not aim to extinguish existing foreign ownership rights overnight;[209] and (b) access to land is retained, but in the form of a limited real right (a lease) and not in the form of ownership. The prohibition on the acquisition of agricultural land by foreigners in effect provides citizens with an opportunity and preference to acquire ownership of agricultural land parcels.

3 5 Reflection

3 5 1 Restrictions on subdivision of agricultural land

In light of the aims of different legislative measures, subdivision of agricultural land is either prohibited or allowed. On the one hand, private land owners are restricted from subdividing their agricultural land, without the consent of the Minister.[210] The aim, as mentioned, is to prevent the fragmentation of agricultural land into uneconomic and unsustainable units in order to ensure food security for the population. In this regard, it is averred that restrictions on subdivision do not contribute towards the redistribution of agricultural land. On the other hand, subdivision is allowed where agricultural land is acquired by the State for redistribution purposes.[211] Therefore, where agricultural land is acquired for redistribution purposes, both South Africa and Namibia, allow for the subdivision thereof into small holdings for the purpose of small-scale or subsistence farming.[212] Pienaar avers that where there is a need for small agricultural landholdings for small-scale or subsistence farming, the land market or the government should facilitate it, provided that "the financial grant system is structured in such a manner that small-scale [agricultural] land parcels may be acquired by way of small grants".[213] However, the redistribution of agricultural land for land reform purposes must be weighed up against concerns for agricultural productivity, sustainability, development and food security.

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[208] Clause 1 of the Regulation of Agricultural Land Holdings Bill.
[209] In this regard it is important that the provisions of the Regulation of Agricultural Land Holdings Bill will not operate retrospectively.
[210] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970.
[211] Sections 2(4), 5 of the Land Reform: Provision of Land and Assistance Act 126 of 1996.
[212] Section 38 of the Agricultural (Commercial) Land Reform Act 6 of 1995. In terms of the the Preservation and Development of Agricultural Land Bill, "subsistence" with regard to farming means a farming system where the food and goods produced are predominantly consumed by the farm family and there is little or no surplus for sale.
[213] Pienaar *Land Reform* 352.

The imposition of land ceilings indirectly results in the subdivision of agricultural land and consequently the fragmentation thereof, which may pose a threat to agricultural productivity and food security in South Africa. While the Regulation Bill may aim to provide for a register of the ownership of all agricultural land in South Africa for redistribution purposes, it may also be necessary, as proposed by the Preservation Bill, to make provision for a schedule of "protected agricultural areas"[214] which may only be subdivided under exceptional circumstances or which may not be subdivided to provide for small-scale or subsistence farming purposes. Accordingly, such areas of agricultural land may be excluded from being used as land for redistribution purposes. This would also mean that land ceilings may not be imposed on these identified and listed or scheduled categories of land. This proposal is further explored below.[215]

3 5 2 Restrictions on the amount of agricultural land a land owner may own

The insights drawn from the experience of India, where land ceiling legislation was implemented successfully in some States specifically, will be important for establishing a clearly formulated legal and institutional framework for envisaged land ceilings in South Africa. Given the array of problems identified with the formulation, implementation and administration of the ceiling legislation in India,[216] the South African government should consider the following two options in relation to the Regulation Bill: Firstly, the Regulation Bill should be scrapped and alternative regulatory measures for redistribution should be explored. This would require a focussed effort at exploring methods for identifying, acquiring and redistributing agricultural land.[217] Secondly, if not scrapped, the Regulation Bill in its current form requires further amendments to address the problems identified with the formulation of the ceiling legislation, as set out above.[218] In this regard, it is also necessary to consider the impact of the imposition of land ceilings in the South African context. The implementation of land ceilings will in effect fragment, namely subdivide, agricultural land. As SALA aims to prevent the fragmentation of commercial agricultural farms or prime agricultural land, the subdivision thereof may result in a general decline of agricultural productivity, which in turn poses a threat to food security in South Africa. It may be

[214] Clause 1 of the Preservation and Development of Agricultural Land Bill defines a "protected agricultural area" as: "(a) an agricultural land use zone, protected for purposes of – (i) food production; and (ii) ensuring that high value agricultural land are protected against non-agricultural land uses in order to promote long-term agricultural production and food security; (b) includes all areas demarcated as such in accordance with section 15; and (c) may include high value agricultural land and medium value agricultural land".
[215] See 3 5 2 below.
[216] See Chapter 8, 3 3 and Chapter 9, 3 3 1 above.
[217] See Chapter 10 below.
[218] See 3 3 1 above.

necessary, in light of food security concerns, to exempt certain high value agricultural land from the operation of land ceilings, which can accordingly not be subdivided. As suggested above, this would entail providing for a list or schedule of agricultural land in the Regulation Bill which constitutes a "protected agricultural area". The Preservation Bill defines "protected agricultural areas" as:

> "(a) an agricultural land use zone, protected for purposes of – (i) food production; and (ii) ensuring that high value agricultural land are protected against non-agricultural land uses in order to promote long-term agricultural production and food security; (b) includes all areas demarcated as such in accordance with section 15; and (c) may include high value agricultural land and medium value agricultural land".[219]

The Minister of Agriculture, Land Reform and Rural Development may declare an area a "protected agricultural area" in the *Government Gazette*.[220] The ceiling legislation in India also allows the Minister to exempt certain categories of land, including land held by cooperative farming societies, from the operation of the ceiling legislation. It does not however make provision for a schedule which exempts these categories of land for the purpose of preservation. Interestingly, the RFTLARRA prohibits the acquisition of irrigated multi-cropped land.[221] It is suggested that irrigated multi-cropped land may only be acquired in exceptional circumstances as a last resort.[222] Irrigated multi-cropped land may be regarded as "high value agricultural land"[223] in the South African context which forms part of the definition of "protected agricultural areas". Similarly, the Regulation Bill also provides that the Minister may exempt certain categories of land from the operation of the Regulation Bill.[224] It is in this regard that it may be proposed that the Regulation Bill provide for a schedule of agricultural land, defined as "protected agricultural areas" which is exempted from the operation of the ceiling legislation. In this way, certain areas of agricultural land, which are important for food security, may be excluded from being subdivided. In principle,

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[219] Clause 1 of the the Preservation and Development of Agricultural Land Bill defines "high value agricultural land" as: "land best suited to, and capable of, consistently producing acceptable levels of goods and services for a wide range of agricultural enterprises in a sustainable manner, taking into consideration expenditure of energy and economic resources" and "agricultural land use zones" as: "zones, based on the – (a) agricultural potential; (b) agricultural capability; (c) agricultural suitability; (d) conservation status; (e) use; and (f) geographic location".
[220] Clause 15 of the the Preservation and Development of Agricultural Land Bill.
[221] Section 10 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[222] Section 10(2) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[223] Clause 1 of the the Preservation and Development of Agricultural Land Bill.
[224] Clause 25(1)(c) of the Regulation of Agricultural Land Holdings Bill.

all other agricultural land falling outside the definition of “protected agricultural areas” may be subdivided.

3 5 3 Restrictions related to foreign ownership of agricultural land

As mentioned above,[225] restrictions related to foreign ownership of agricultural land are a world-wide phenomenon. While there are currently no restrictions on foreign ownership of agricultural land in South Africa, legislative redress may be required to broaden access to agricultural land, to South African citizens. If it is assumed that a change pertaining to foreign land ownership in South Africa is required, then the question remains how or to what extent foreign ownership of agricultural land should be regulated. Given the fact that similar segregationist history and inequality in relation to land dominated across racial lines in Namibia and South Africa, Namibia may provide some insight into the formulation of a legal framework to allow for restrictions on foreign ownership in South Africa.

Importantly, while the Namibian Constitution expressly provides that restrictions may be imposed on foreigners, the Constitution does not provide for land reform or the mandate to broaden access to land as set out in the South African Constitution. While the constitutional basis is not identical, the legal positions in Namibia and South Africa are still comparable given the shared historical context. As elaborated on in Chapter 7 and above,[226] Namibia does not prohibit foreign ownership outright but rather regulates the acquisition of foreign ownership of agricultural land by means of an approval process.[227] In this way, the Minister may approve (also conditionally) or reject an application for the acquisition of agricultural land by a foreign national.[228] The legislation further provides that the Minister may not grant the application for foreign ownership or occupation, if he or she is not satisfied that the acquisition of the land: (a) will constitute an eligible investment as contemplated in the Foreign Investments Act 27 of 1990; (b) “is capable of being used or occupied beneficially for the purpose which the applicant proposes to use or occupy it”; or (c) “the use and occupation of the land concerned will not have an adverse effect on the environment or adequate measures will be provided for to deal with any adverse environmental consequences”.[229] The discretion provided to the Minister, guided by these considerations, ensures, to an extent, that ownership of agricultural land remains in the hands of Namibian

[225] See 3 4 above.
[226] See Chapter 7, 3 3 and 3 4 above.
[227] Section 58(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[228] Section 58(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[229] Section 58(6) of the Agricultural (Commercial) Land Reform Act 6 of 1995.

citizens. Furthermore, ACLRA also provides that foreigners (or citizens), when disposing of agricultural land must first offer it to the State, before it enters the open market.[230] Only when the State waives its interest, by issuing a certificate of waiver,[231] may the land thereafter be offered to private buyers.

By way of contrast, the proposed Land Bill, outright bans a foreign national from acquiring ownership of agricultural land. However, the Bill makes provision for a few exemptions in this regard.[232] Under the Land Bill foreign nationals will be restricted to acquiring a right to occupy agricultural land or a portion thereof by means of lease.[233] Such an agreement can only be entered into after written approval of the Minister is obtained.[234]

The Regulation Bill, in comparison to the Namibian position, provides for more stringent restrictions on foreign ownership in light of the constitutional mandate to broaden access to land to citizens. When viewed in light of the constitutional mandate, the restrictions on the disposal of agricultural land owned by foreign persons and the prohibition on acquiring agricultural land in future seems to be a logical step. However, it is possible that this form of legal redress may have an adverse impact on foreign investment in South Africa. Accordingly, it may be prudent for South Africa to consider amendments to the Regulation Bill. In light of the Namibian position, the acquisition of foreign ownership may still be prohibited. However, it is suggested that such prohibition is not absolute and should rather be subject to an approval process as provided for under ACLRA. In this way, less restrictive means may be used to receive the same result, namely to regulate the acquisition of agricultural land by foreigners more effectively.

4 Approaches to acquiring agricultural land

4 1 Introduction

The regulation of agricultural land may open up agricultural land to be acquired for redistribution purposes. In this regard, different approaches to acquiring agricultural land exist, notably, market-led approaches; expropriation; or confiscation. As is evident from previous chapters, both market-led approaches and expropriation may be employed in all three jurisdictions under investigation to acquire agricultural land for the purpose of

[230] Section 17(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[231] Section 16 read with section 17(2)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[232] Clause 115 of the Land Bill B19-2016.
[233] Clause 114(3) of the Land Bill B19-2016.
[234] Clause 114(3) of the Land Bill B19-2016.

redistribution. Accordingly, for comparative purposes, the focus falls on these two types of acquisition approaches.

4 2 Market-led approaches

Depending on whether a particular government follows a demand[235] or supply[236] market-led approach, the land purchase programmes essentially differs in terms of two aspects: (a) who initiates the purchase of the land; and (b) the financial technicalities, namely (i) the grant amount, if any, provided to the beneficiaries for the purchase of land; (ii) what the repayment terms are, if any, in relation to the total cost of the land purchased; and (iii) who should establish a business plan and what the content of such a business plan should be.

In Namibia, where a land owner (citizen or foreigner) aims to dispose of agricultural land, ACLRA provides that he or she must first offer the land to the Minister for acquisition.[237] This allows the Minister to acquire agricultural land for redistribution on behalf of beneficiaries. This approach is in line with the supply-led approach to the acquisition of land, where the State purchases land upfront from land owners and later identifies beneficiaries to whom the land can be made available in terms of lease or title by way of transfer. The intended beneficiaries are defined in policies and schemes. For example, different types of beneficiaries, with different means, are identified in terms of the AALS and the National Resettlement Policies.[238] The grant amount and repayment terms are likewise determined by the respective scheme and policy.

In India, specifically in the State of West Bengal, the State also follows a supply-led approach to acquiring agricultural land. The State initiates the land purchase act; identifies the parcel of land for acquisition; negotiates the price; and develops, together with the beneficiary a business plan, for farming the land.

The South African government has followed both demand-led and supply-led approaches to acquiring agricultural land for redistribution on the market.[239] Notably, however, there was a shift from a demand-led approach to a supply-led approach in 2006.[240] In this regard, as highlighted by Chapter 6, different grant schemes with different intended beneficiaries have

[235] Chapter 5, 2 3 above.
[236] Chapter 5, 2 4 above.
[237] Section 17(2) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[238] See Chapter 7, 4 4 3 and 4 4 4 and Chapter 9, 5 2 above.
[239] See Chapter 5, 3 2 and 3 3 above.
[240] See Chapter 5, 3 3 above.

been employed over the last decade. Accordingly, South Africa, Namibia and India all follow a supply-led approach to acquiring agricultural land on the market.

South Africa, like Namibia, initially followed a market-led approach to acquiring agricultural land for redistribution purposes. However, recent populist cries, emphasising the slow pace of land reform, and more specifically redistribution, have urged the South African government to use its expropriation powers more readily in future so as to accelerate redistribution. Accordingly, as mentioned in Chapter 5, the State has proposed to (a) amend the Constitution to provide for expropriation without compensation; and (b) drafted a new Expropriation Bill.[241] Given the lack of experience with expropriating agricultural land for redistribution purposes, it may be insightful to consider and learn from the expropriation and redistribution processes in Namibia and India respectively. Ultimately, these jurisdictions may provide additional guidance on formulating and implementing the proposed expropriation legislation in South Africa.

4 3 Expropriation

4 3 1 Introduction

As set out in Chapter 5 above,[242] sections 25(1), 25(2) and 25(3) of the South African Constitution set out the elements for a valid expropriation.[243] In this regard, section 25(2) does not protect private property per se. Instead, it simply provides for the circumstances under which the State can lawfully expropriate property.[244] Similarly, article 16(2) of the Namibian Constitution allows property to be expropriated in the public interest. Furthermore, every Indian State has the authority to acquire land situated within the limits of its jurisdiction for public utility or public purpose.[245] Accordingly, the power to expropriate agricultural land

[241] See Chapter 5, 3 3 2 – 3 3 3 above.
[242] See Chapter 5, 3 2 above.
[243] Sections 25(2), (3) and (4) of the Constitution of the Republic of South Africa, 1996. Apart from the requirements for an expropriation set out in section 25(2) of the Constitution, an expropriation must also meet the requirements of a deprivation in section 25(1) of the Constitution, because all expropriations are treated as a subset of deprivations. In other words, if a deprivation of property passes scrutiny under section 25(1) of the Constitution (i.e. it does not infringe section 25(1)), then the question arises whether the deprivation amounts to an expropriation. If the deprivation amounts to an expropriation, then it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b). See *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 57-59 in this regard. See Chapter 4, 2 in this regard.
[244] H Mostert ""The poverty of precedent on public purpose/interest"" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans & LCA Verstappen (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 59-92, 59; BV Slade *The Justification of Expropriation for Economic Development* LLD, Stellenbosch University (2012) 48; Van der Walt *Constitutional Property Law* 459.
[245] Article 298(i) of the Indian Constitution, 1950.

for redistribution is part of any State's power of eminent domain and is thus not questioned. However, the manner in terms of which a State exercises its expropriation powers may affect the validity of the expropriation. In this light, the *Kessl*-judgment,[246] which highlights the procedure which has to be followed by the State for an expropriation to be valid in Namibia, may provide some insight into the manner in which a government should exercise its expropriation powers. Another important consideration for the expropriation procedure, coupled with the determination of the suitability of the agricultural land for redistribution purposes, is the impact the expropriation may have on (a) vulnerable persons with land interests, for example, farm workers and tenants; and (b) food security. Accordingly, legislative mechanisms in India are also considered in this context. Apart from the expropriation procedure itself and the considerations pertaining to the suitability of the agricultural land for redistribution purposes, another important question that needs to be considered is the payment of compensation, if any, for agricultural land expropriated for redistribution purposes. These aspects are discussed below respectively.

4 3 2 The expropriation procedure

In Namibia's landmark case dealing with the expropriation of agricultural land, namely the *Kessl*-judgment,[247] the Court highlighted the importance of following the correct expropriation procedure in terms of the authorising legislation. It held that a clear and transparent expropriation process, in line with the rules of natural justice should be followed for an expropriation to be valid.[248] Where the State does not follow the procedure set out in the authorising legislation, like in *Kessl*, it may result in litigation which may be time-consuming and costly - not only for the land owner, but also for the State.

Furthermore, one of the most important aspects highlighted in the *Kessl*-judgment is that the expropriation procedure requires a uniform and clear approach to identifying agricultural land suitable for expropriation for redistribution purposes from the outset. In other words, it should be clear why and how certain agricultural land was or parcels of agricultural land were identified for expropriation. Following the *Kessl*-judgment, a set of regulations[249] were promulgated to assist the Namibian Land Commission in identifying suitable agricultural land

[246] See Chapter 7, 4 3 4 1 above for a discussion of the *Kessl*-judgment in depth.
[247] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC). See Chapter 7, 4 3 4 1 above.
[248] *Kessl v Ministry of Lands and Resettlement and two similar cases* 2008 1 NR 167 (HC) para 56; the Agricultural (Commercial) Land Reform Act 6 of 1995.
[249] See Regulations on criteria to be used for expropriation of agricultural land GN 209 of 2016 *GG* 6115 (1 September 2016), read with section 20(1A) of the Agricultural (Commercial) Land Reform Act 6 of 1995.

for redistribution purposes by setting out criteria.[250] The regulations specifically provide that if the Minister decides to expropriate property, the Minister is obliged to (a) use the identification criteria in selecting agricultural land eligible for expropriation;[251] and (b) conduct a suitability assessment to determine if the agricultural land is suitable for redistribution.[252] The agricultural land must also be scored in accordance with the scoring criteria provided for in the regulations.[253] In this regard, the regulations provide for a checklist and formula to determine whether the agricultural land is either highly suitable; suitable; moderately suitable; or not suitable at all for resettlement purposes.[254] Importantly, resettlement purposes include the redistribution of the land for residential and agricultural purposes.

In South Africa, the Expropriation Act provides that any particular property may be subject to inspection to determine whether the property is "suitable for the purposes or use contemplated".[255] By way of contrast, the 2019 Expropriation Bill,[256] places an obligation on the expropriating authority to "ascertain the suitability of the property for the purpose for which it is required"[257] when considering the expropriation of property. However, currently, there is no policy or regulations in South Africa which set out how agricultural land for expropriation and redistribution is to be identified and what the criteria to determine suitability should be. In other words, there are no prescribed suitability criteria which the expropriating authority may use to determine whether the property in question will be suitable for redistribution purposes specifically. Whether the land is suitable for redistribution purposes is dependent on the differential land needs and demands of the people of South Africa.[258] However, there is also no database which provides for different land needs and demands in different regions and for what purpose people seek land. It is also unclear who the potential beneficiaries of the redistribution programme ought to be. In this regard, for the sake of a transparent, procedurally fair and effective redistribution process in South Africa, guidelines regarding objective, non-arbitrary criteria for identifying suitable agricultural land for different

[250] See Regulations on criteria to be used for expropriation of agricultural land), read with section 20(1A) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[251] Regulation 2(1)(a) on criteria to be used for expropriation of agricultural land.
[252] Regulation 2(1)(b) on criteria to be used for expropriation of agricultural land.
[253] Regulation 2(2) on criteria to be used for expropriation of agricultural land.
[254] See Chapter 7, 4 3 5 above in this regard.
[255] Section 6(1) of the Expropriation Act 63 of 1975.
[256] Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018.
[257] Clause 5(1)(a) of the Draft Expropriation Bill B-2019.
[258] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 30-07-2019) 56, 94.

land needs and demands should be developed and provided for in regulations or policy. This proposal is explored further in Chapter 10 below.

4 3 3 The impact of the expropriation

Apart from the manner in which the government exercises its expropriation powers, the impact of the expropriation must also be taken into account. One of the greatest problems of expropriating agricultural land, for redistribution purposes, is the possibility that people working or living on the land may be displaced in the process. Accordingly, while the expropriation may ensure that land is redistributed to one or more beneficiary, the process may adversely impact a larger group of vulnerable people in relation to the group that it benefits. To minimise the displacement of vulnerable people, India's expropriation legislation, namely the RFTLARRA mandates the State to conduct a social impact assessment before making a decision on whether to expropriate the identified land.[259] The legislation also mandates the creation of a rehabilitation and resettlement scheme in every State. These measures ensure that people who are dependent on the land for their livelihood, such as farm workers and their dependents, are not displaced or rendered homeless. The scheme must include an estimation of the affected families and the number of families among them likely to be displaced; steps that will be taken by the State to minimise displacement, the amount of compensation payable to the land owner and importantly, employment opportunities to be allocated to the affected family.[260]

Similarly, in South Africa, there are many non-owners who are also dependent on the land, particularly agricultural land, for their livelihood. In order to ensure that vulnerable persons, such as labour tenants[261] or occupiers,[262] are not displaced by an expropriation for redistribution purposes, it may be necessary to include, like in India, a social impact assessment study when investigating whether the land is suitable for expropriation. Alternatively, or in conjunction with the social impact assessment, each province should establish a rehabilitation and resettlement scheme in cases where it may be necessary to expropriate agricultural land even when displacement ensues.

[259] Sections 4-8 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[260] Section 4(4) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[261] In terms of the Land Reform (Labour Tenants) Act 3 of 1996.
[262] In terms of the Extension of Security of Tenure Act 62 of 1997.

Other considerations should also be taken into account, such as the impact the expropriation of agricultural land may have on food security. Interestingly, India's overarching expropriation legislation, the RFTLARRA, also prohibits the State from acquiring prime, namely multi-cropped and irrigated, agricultural land for development purposes, in light of the need to safeguard food security.[263] Irrigated multi-cropped land may only be acquired in exceptional circumstances, as a last resort.[264] Similarly, it may be argued that "high value agricultural land"[265] or "protected agricultural areas"[266] may not be subdivided by way of land ceilings or expropriated for development purposes in South Africa to safeguard food security. However, high value (prime) agricultural land and protected agricultural areas may still be expropriated and redistributed to competent beneficiaries, provided that the land is used for agricultural purposes. In this way, redistribution is still effected without changing the quality or size of these types of agricultural land. As mentioned above, it is suggested that a register of all agricultural land, which also provides for a scheduled list of protected agricultural areas, may be useful in this context.

4 3 4 Compensation for expropriation

Apart from the expropriation procedure, and considerations pertaining to the suitability of the land for expropriation and redistribution purposes, another important question is the issue of compensation.

The Namibian Constitution provides that expropriation is subject to just compensation.[267] ACLRA, which gives effect to the Constitution, does not stipulate that in determining compensation, reference should be made to market value.[268] However, it is clear that ACLRA refers to the market value "and restricts the amount calculated as compensation to an amount that would be realised on the open market in a willing-seller, willing-buyer scenario".[269] This means that compensation for an expropriation for the purposes of resettlement under Namibian law can never be above market value.[270]

[263] Section 10 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[264] Section 10(2) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[265] Clause 1 of the the Preservation and Development of Agricultural Land Bill.
[266] Clause 1 of the the Preservation and Development of Agricultural Land Bill.
[267] Article 16(2) of the Constitution of the Republic of Namibia, 1990.
[268] Vermeulen *A comparative assessment of the land reform programme in South Africa and Namibia* 51.
[269] Treeger *Legal analysis of farmland expropriation in Namibia* (2004) 8.
[270] 8.

In the context of land ceiling legislation in India, each State government was left to determine the amount of compensation, if any, payable to land owners for their ceiling-surplus land. Accordingly, while there is no uniformity among States regarding the calculation of compensation for ceiling-surplus land, Behuria suggests that the amount of compensation paid to land owners is negligible when compared to the market value of the agricultural land.[271] Notably, and generally, compensation paid for the expropriation of ceiling-surplus agricultural land is below market value.[272] While this may make the redistribution process more affordable for the government, it is important to note that the inadequate, unfair or low amount of compensation paid to land owners for ceiling-surplus land is averred as one of the reasons for the failure of the ceiling legislation in India.[273] The inadequate or low compensation paid to land owners[274] for surplus land, made the programme unpopular with land owners, which in turn led to land owners circumventing the provisions of the land ceiling legislation. For example, land owners either transferred or partitioned land to ensure that their land fell outside the scope of the ceiling limit or categorised their land to fall outside the operation of the ceiling legislation in general. However, where compensation is not fixed well below the market value of the property, it may not be "within the paying capacity of the new allottees mainly comprising the landless agricultural workers who belong to the SCs and the STs".[275]

The South African Constitution currently provides that property may be expropriated subject to just and equitable compensation.[276] The amount of compensation, time and manner of payment, must be "just and equitable",[277] which must reflect an equitable balance between the public interest, land reform, and the interests of those affected. As set out in Chapter 5,[278] just and equitable compensation does not have to equal market value. Market value is but one factor that may be considered in determining compensation for an expropriation.[279] In this light, it is stated that the Constitution allows for compensation that is below market

[271] Behuria *Land Reforms Legislation in India* 140.
[272] 140.
[273] See 3 3 1 4 and Chapter 8, 3 3 above.
[274] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247.
[275] Ashokvardhan *Ceiling Laws in India* 19-20.
[276] Section 25(2) of the Constitution of the Republic of South Africa, 1996; preamble of the Draft Expropriation Bill B-2019.
[277] Section 25(3) of the Constitution of the Republic of South Africa, 1996; preamble of the Draft Expropriation Bill B-2019.
[278] See Chapter 5, 3 2 3 2 above.
[279] Section 25(3) of the Constitution of the Republic of South Africa, 1996.

value, which may even, in certain circumstances amount to nil compensation provided that it is just and equitable.

It is within the government's power to provide for circumstances under which nil compensation may be payable in legislation, as set out in the Expropriation Bill.[280] Accordingly, whether compensation, if any, is payable, as well as the particular amount, is dependent on the circumstances of each case. What is clear it that such amount, given the circumstances, may be less than market value or even equal to nil compensation.

4 4 Reflection

Concerning the acquisition of agricultural land, Pienaar suggests that:

> "Perhaps the answer lies not so much in 'an either or' approach, but in a more nuanced or dualistic approach where the success of the programme is not locked into *one single mechanism or approach*".[281]

Accordingly, both market-led approaches and expropriation ought to be used to acquire agricultural land for redistribution purposes, as is the case in the Namibian context. Furthermore, the degree of State involvement in acquiring agricultural land for redistribution is determined by whether a demand-led or supply-led model is followed in a particular instance.

Regardless of whether market-led approaches or expropriation is used to acquire agricultural land for redistribution, the following questions identified by Kepe and Hall should be considered and attended to in either legislation or in policy: Firstly, how should land be identified and acquired[282] and secondly, how should land be valued?[283]

With regard to the first question and in relation to the expropriation procedure as a whole, there is currently no policy on identifying suitable (agricultural) land for redistribution

[280] Clauses 12(1) and 12(3) of the Draft Expropriation Bill B-2019.
[281] Pienaar *Land Reform* 361.
[282] T Kepe & R Hall "Land Redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2018) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 03-07-2019) 84-85.
[283] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 84-85.

purposes specifically. The closest formulation of suitable agricultural land for redistribution may be the categories of land identified in the Expropriation Bill for which nil compensation may be paid.[284] However, it may be necessary to develop a set of criteria which should guide the government in determining whether the agricultural land in question is suitable for redistribution purposes. The criteria set out in the regulations in Namibia[285] may be useful in formulating criteria for suitability in the South African context.

With regard to the second question, there is no integrated approach to determining compensation for agricultural land for redistribution purposes.[286] In this regard, Kepe and Hall identify several sub-questions that the South African government needs to consider, namely:

> "What should the state, or beneficiaries, pay for land? Should this be a 'market' price, a negotiated price, or a price determined on the basis of Section 25(3) of the Constitution? If the latter, how should 'just and equitable' compensation be defined? How should the history of acquisition, market value, past subsidies, current use and purpose of expropriation be defined, and how can a formula be developed to clarify this? Should a case be taken to the Constitutional Court precisely to get judicial guidance on how to address valuation?"[287]

Furthermore, although speculative at this point, the South African government should also consider whether compensation for land acquired for redistribution purposes (or in the public interest) should be payable at all in light of the possibility that the Constitution may be amended to provide for expropriation without compensation. Such a consideration will only play a role once it is established to what extent the Constitution will be amended. In this regard, the circumstances under which nil compensation is payable should be clearly outlined in legislation. The draft provisions of the 2019 Expropriation Bill indicate five categories of land which may be expropriated for nil compensation if it is just and equitable

[284] Clause 12(3) of the Draft Expropriation Bill B-2019.
[285] See Chapter 7, 4 3 5 above.
[286] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 13.
[287] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 84-85.

to do so.[288] The *Land Reform Report*[289] also recommends the following categories of land which may be expropriated for nil compensation:

> "(a) abandoned land; (b) hopelessly indebted land; (c) land held purely for speculative purposes; (d) unutilised land held by state entities; (e) land obtained through criminal activity; (f) land already occupied and used by labour tenants and former labour tenants; (g) informal settlements areas; (h) inner city buildings with absentee landlords; (i) land donations (as a form of E[xpropriation] W[ithout] C[ompensation]); and (j) farm equity schemes."[290]

Accordingly, the determination of categories of land which may be expropriated for nil compensation in the public interest (for land redistribution purposes, *inter alia*) should be clearly formulated in policy or in legislation.

5 Redistribution of agricultural land

5 1 Introduction

Once the land is identified as suitable for acquisition and redistribution and the land is acquired by the State by way of a market-led approach or expropriation, the land needs to be redistributed. The questions in this regard are (a) who the beneficiaries ought to be; (b) how the beneficiaries ought to be selected; (c) how much land the beneficiary ought to acquire; and (d) what type of right(s) or benefits the beneficiaries ought to receive under the redistribution programme.[291] In this regard the beneficiary target groups depend on the specific aims of each jurisdiction's land reform, or specifically redistribution, programme. Herewith a discussion of the listed issues in the three relevant jurisdictions.

5 2 Namibia

In Namibia, ACLRA provides for a wide category of beneficiaries, namely "Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices".[292] However, ACLRA does not provide for a procedure for potential beneficiaries to lodge an application; criteria for determining who the beneficiaries are or

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[288] Clause 12(3) of the Draft Expropriation Bill B-2019. See Chapter 5, 3 2 3 4 above.
[289] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 30-07-2019) 80.
[290] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 80.
[291] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 84-85.
[292] Preamble and section 14(1) of Agricultural (Commercial) Land Reform Act 6 of 1995.

should be or a selection process in deciding which beneficiaries should acquire the agricultural land available for redistribution purposes. Instead, these procedures, criteria and selection process are all set out in schemes and policies. Each policy or scheme provides for different target groups; qualifying criteria; selection criteria; and a selection process. The only threshold requirements in all the schemes and policies are that the applicant must be (a) a Namibian citizen; and (b) must have been socially, economically or educationally disadvantaged.[293] For example, where the AALS[294] is tailored for and aimed at emerging communal and commercial black farmers, the NRP[295] is aimed at the poorest of the poor, specifically the San-community; ex-soldiers; displaced, destitute or landless persons; people with disabilities and people from overcrowded communal areas. Each scheme and policy also provides for different qualifying and selection criteria.

In accordance with the qualifying selection criteria, an ideal beneficiary or applicant under the AALS is a full- or part-time, creditworthy[296] communal or commercial farmer with a minimum of 150 large livestock units (such as cattle) or 800 small livestock units (such as goats and sheep)[297] "or own productive livestock equivalent to at least 35% of official carrying capacity of the farm which, he/she intends purchasing, and /or have the financial capacity to purchase such livestock".[298]

Under the NRP, and in accordance with the qualifying and selection criteria and points system,[299] an ideal beneficiary will be a woman, between the ages of 26 and 60, who is a generational farm[300] worker from a communal area, who is solely dependent on farming; has experience in agricultural activities or who is trained in agriculture, but has no access to

[293] However, the legislation does not define what it means to have been socially, economically or educationally disadvantaged.
[294] For a discussion on this scheme see Chapter 7, 4 4 2 above.
[295] For a discussion on this policy see Chapter 7, 4 4 3 above.
[296] AgriBank Namibia "Affirmative Action Loan Scheme (AALS)" <http://agribank.com.na/product/affirmative-action-loan-scheme-aals-1> (accessed 21-09-2018); B Fuller "Improving tenure security for the rural poor" (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 1-35, 6, 12-13.
[297] AgriBank Namibia "Affirmative Action Loan Scheme (AALS)" <http://agribank.com.na/product/affirmative-action-loan-scheme-aals-1> (accessed 21-09-2018); Fuller "Improving tenure security for the rural poor" (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 6, 12-13; Vermeulen A comparative assessment of the land reform programme in South Africa and Namibia 55-56.
[298] AgriBank Namibia "Affirmative Action Loan Scheme (AALS)" <http://agribank.com.na/product/affirmative-action-loan-scheme-aals-1> (accessed 21-09-2018); Fuller "Improving tenure security for the rural poor" (2006) *Legal Empowerment of the Poor (LEP) Working Paper No 6* 6, 12-13.
[299] See Chapter 7, 4 4 3 above.
[300] Generational farm workers are generally considered to be those persons that have been working on farms for at least a generation or longer, often leaving them with no roots in any other settlement area, village, town or city. See Ministry of Lands, Resettlement and Rehabilitation, *Resettlement Criteria* <http://209.88.21.57/documents/20541/88025/Resettlement_Criteria.pdf/88db4b77-0fb4-472a-a271-8a8441c5ce4d> (accessed 06-02-2019) 6.

land; has the basic required reading and writing skills and who owns less than 150 large stock or 800 small stock.[301]

Importantly, while the policy recognises that the "scoring system" may not be a sufficient tool for the selection of the most appropriate beneficiaries, it does provide for a single and uniform selection system.[302] This in turn provides for a measure of transparency, certainty and consistency in selecting beneficiaries under the redistribution programme. [303]

The quantity of agricultural land that should be redistributed to the different beneficiaries under the scheme and policy is not set out. The type of right a beneficiary acquires under the different scheme or policy also differs. Under the AALS, beneficiaries purchase the agricultural land with the help of a loan. Accordingly, once the purchase is complete, the beneficiary becomes the owner of the land. The beneficiary is also prohibited from selling the land in the first 10 years of occupation. Under the NRP the successful applicants will acquire the land on a leasehold basis, for a period 99 years.[304] The right of leasehold is then registered under the Deeds Registries Act 47 of 1937. Accordingly, beneficiaries will not become the owner of the agricultural land, but will have legally secure occupational and agricultural rights for the duration of their tenure. [305]

A *revised National Resettlement Policy (2018-2027)* has also been released. The same target or beneficiary groups identified under the NRP are again identified in the revised policy. Likewise, identical resettlement criteria as discussed above are also used to select the most suitable applicants for resettlement.[306] However, the revised policy categorises the potential beneficiaries into three main groups, namely (a) commercial farmers; (b) communal farmers; and (c) non-farming individuals who are in need of resettlement.[307] In line with these categories, the revised policy makes provision for new resettlement land occupation models.[308] These resettlement models are tailored to the varying land needs of the eligible beneficiary groups and which can accommodate the different farming systems in Namibia.[309] The models are the (a) HEVM; (b) MEVM; and (c) LEVM.[310] Each model targets a different

[301] Ministry of Lands, Resettlement and Rehabilitation *Resettlement Criteria* 7, 11.
[302] 2.
[303] 2-3.
[304] Ministry of Lands, *Resettlement and Rehabilitation National Resettlement Policy* (July 2001) 6.
[305] 6.
[306] See 4 4 1 2 above.
[307] Ministry of *Land Reform, Revised National Resettlement Policy 2018-2027* (March 2017) 17.
[308] 18.
[309] 18.
[310] For a discussion on the different models see Chapter 7, 4 4 4 above.

group of beneficiaries, with correspondingly different land needs. The models also provide for different (a) quantities of agricultural land that should be distributed; and (b) different land rights or benefits to be received by the relevant beneficiary. While complex, this differential approach to redistributing land may be very useful when formulating a national policy on redistribution in South Africa.

5 3 India

In India, the target beneficiaries; the order of preference (or "priority of allotment");[311] the rights acquired and the terms of settlement vary under the ceiling-legislation, depending on the particular State.[312] Generally however, most ceiling laws make provision for the redistribution of ceiling-surplus land to the landless, agricultural tenants and labourers and/or displaced persons. In West Bengal, first priority is given to the *bargardar* cultivating the land.[313] In this regard, under the WBLRA, the locality of the land in relation to where the potential beneficiary is situated or resides determines the eligibility of a beneficiary. For example, persons who qualify as beneficiaries and are local residents where the ceiling-surplus land is situated, may be given preference over a person or family not residing in close proximity to the land identified for redistribution.[314] Conversely, those persons would be preferential beneficiaries where land suitable for redistribution is identified in their localities. Thereafter, preference is given to people belonging to the SCs or the STs[315] or groups of people forming "cooperative societies".[316] The Act also obliges beneficiaries who obtain agricultural land to use the land for personal cultivation,[317] namely subsistence farming. Thus, the aim is not so much the promotion of commercial farming.

In both India and Namibia, the spectrum of land sizes is unclear. The legislative measures do not indicate specific land size brackets or the extent of land to be acquired by the beneficiary. In West Bengal, beneficiaries, once settled, acquire ownership of the ceiling-surplus land and are prohibited from transferring the land, except if it is transferred "to [the] State Government [or a] Cooperative Society for obtaining a loan for [the] development of

311 Behuria *Land Reforms Legislation in India* 144.
312 Behuria *Land Reforms Legislation in India* 144-160. See also Chapter 8, 3 2 6 in this regard.
313 Section 49 of the West Bengal Land Reforms Act 10 of 1956.
314 Section 3(8) of the West Bengal Land Reforms Act 10 of 1956 provides that such a person or a member of his family must reside for the greater part of the year in the locality where the land is situated and the principal source of his income must also be the produce of such land.
315 The SCs and STs are constitutionally recognised and regarded as officially designated groups of historically disadvantaged people in India. Article 366, clauses 24 and 25 of the Constitution of India, 1950 specifically recognises SCs and STs. See also Behuria *Land Reforms Legislation in India* 142, 164.
316 Behuria *Land Reforms Legislation in India* 157.
317 "Personal cultivation" is defined differently in the States' land reform legislation.

land, improvement of agricultural production or for construction of a dwelling house".[318] In this regard, many States prohibit transfer of the acquired land for a determined period of time. These periods of time differ from State to State.[319] However, in West Bengal, no time period is attached to this prohibition and therefore it is unclear whether the beneficiary or his/her heirs may be allowed to sell the land in future once it is acquired. Accordingly, in a way, beneficiaries do not receive full ownership of the land, because the entitlement to dispose of the land is excluded.

5 4 South Africa

In South Africa, a number of different redistribution schemes and policies have been followed under different ministerial leadership over the years, aimed at different target groups and beneficiaries, providing for different types of rights to the acquired agricultural land.[320] In this regard, various grant assisted programmes[321] were embarked on to allow beneficiaries to acquire agricultural land.

In general, similar to the Namibian position, beneficiaries of the redistribution programme are regarded as Black South African citizens who were previously disadvantaged by past discriminatory laws and practices. However, there is no national policy which provides for an order of preference (or priority) or selection criteria within this broad category. The lack of such an overarching policy poses difficulties in relation to who should receive the land acquired in terms of the redistribution programme, given particular circumstances. Furthermore, the different schemes and policies have also provided the beneficiaries with different types of rights to the acquired agricultural land.[322]

In this regard, Kepe and Hall aver that a number of questions pertaining to the selection of the beneficiary or groups of beneficiaries and the type of right beneficiaries should acquire

[318] Section 49(1A) of the West Bengal Land Reforms Act 10 of 1956. See also Behuria *Land Reforms Legislation in India* 157-158.
[319] Behuria *Land Reforms Legislation in India* 143.
[320] R Hall "Who, what, where, how, why? Many disagreements about land redistribution in South Africa" in B Cousins & C Walker (eds) *Land Divided, Land Restored* (2015) 127- 144, 134-139.
[321] For example, see the discussion in Chapter 5, 2 above on the different grant programmes: SLAG, LRAD and PLAS.
[322] See Chapter 5, 2 3 – 2 5 above dealing with the different policies and the rights and benefits afforded to each beneficiary under the different policies. See for example, SLAG; LRAD; PLAS; SLLDP; and the *50/50* policy.

under the redistribution programme, needs to be addressed - either in legislation or in policy.[323]

The first question they pose is, "who should get the land"?:[324]

> "Should this be the 'rural poor', the experienced, the dispossessed or the creditworthy? Should emerging black commercial farmers be the focus? What about farm workers? Or should it be urban business people and entrepreneurs with capital to invest? Related to this is how public funds should be distributed: should the wealthy get substantially more support than the poor? Should women be prioritised or not? What would priority to women and to the poor require in terms of policy prescription, and how would this be assessed?"[325]

They also question what rights beneficiaries should have:

> "Should they be owners of the land? Or longterm lessees? What is the rationale for leasing, and should those who don't pay lose their land? Does the state have the capacity to enforce leases and extract rents – now and in the future when more properties are obtained? Should land be held by traditional councils on behalf of communities, or by beneficiaries through communal property institutions? Is payment of rent to the state a feasible and workable system, and what does the track record of the past decade tell us about this? Should people obtain secure long-term rights, or contingent rights based on 'production discipline' and a 'use it or lose it' approach? What capacity does the state have to determine effective use of land within people's available resources? And is there a strong political and legal rationale for land reform beneficiaries' tenure to be contingent on 'production discipline' while private owners' tenure is not?."[326]

The target beneficiaries in South Africa have, over the years, shifted from the poorest of the poor to emerging commercial farmers, to farm workers and tenants who work or reside on the agricultural land.[327] Like in Namibia and India, there is again no policy or scheme that sets out the quantity of agricultural land each beneficiary or household can obtain under the redistribution programme. The type of rights acquired by the beneficiaries under the redistribution programmes also vary. Some programmes allow for beneficiaries to acquire ownership of the land.[328] Other programmes allow beneficiaries to acquire limited real rights,

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[323] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 84-85.
[324] 84.
[325] 84.
[326] 85.
[327] Compare the aims of SLAG and LRAD with PLAS and the SLLDP for example.
[328] See SLAG and LRAD in Chapter 5, 2 3 above.

namely leasehold.[329] Interestingly, under the 50/50 programme, it seems as if beneficiaries do not obtain any type of right to the land as such. Instead, beneficiaries are given shares in the farming or agricultural enterprise. The latter model does not broaden access to agricultural land, but rather ensures that beneficiaries receive an additional income to contribute to their livelihood.[330]

5 5 Reflection

While the jurisdictions' redistribution programmes discussed above provide for different target beneficiaries; application processes; selection criteria and selection processes, it is pivotal for the sake of transparency, certainty and consistency in selecting beneficiaries and for the administration and implementation of the redistribution programmes as a whole, that a "single and uniform" policy is established.[331] Depending on the aim of the redistribution programme it is also necessary to decide on the type of rights, the beneficiaries will acquire under the redistribution programme.[332]

In the South African context, the Constitution mandates the State to broaden access to land for its citizens, within its available resources.[333] In this regard, it is clear that the target beneficiaries under the redistribution programme should be Black South African citizens. However, as provided for in Chapter 1,[334] access to land does not imply a fundamental right to land. Moreover, it does not guarantee that everyone, or more specifically every black South African citizen, will receive land.[335] "Access", in this context, implies that a person is placed in a position to derive some benefit from the land, which may include occupational rights; use rights or even ownership.[336] In terms of the redistribution programme, questions pertaining to who should benefit; how such a person, entity, community or institution may qualify to benefit; what the benefits should be and when or in which circumstances the benefits would accrue, arise.[337] These questions need to be addressed in legislation and

[329] See PLAS and SLLDP in Chapter 5, 2 4 above.
[330] See Chapter 5, 2 4 above.
[331] Ministry of Lands, *Resettlement and Rehabilitation Resettlement Criteria* 2-3. See also Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 84-85.
[332] Kepe & Hall "Land Redistribution in South Africa" *Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 84-85.
[333] Section 25(5) of the Constitution of the Republic of South Africa, 1996.
[334] See Chapter 1, 2 2 above.
[335] Pienaar *Land Reform* 283.
[336] 283.
[337] 283.

policy measures.[338] In this regard, the concept of "broadening access to land" and "redistribution" are often conflated and mismatched. As highlighted in Chapter 1,[339] redistribution is primarily aimed at altering or diversifying land ownership patterns. While "broadening access to land" may include altering land ownership patterns, it is a wider concept. For example, granting ownership to beneficiaries of the land reform programme as a mechanism to broaden access to land would alter land ownership patterns, whereas granting lease or leasehold would not alter land ownership patterns and would thus not contribute to the redistribution target. However, it would still broaden access to land.[340]

It is proposed that concepts of redistribution and broadening access to land need to be aligned, as they are not identical. Once these concepts are aligned, the following questions need to be addressed in national legislation or policy dealing with redistribution specifically: Firstly, who should qualify as beneficiaries and secondly, how should these beneficiaries be selected? This would require the formulation of qualifying criteria; an application procedure; selection criteria and a selection process in legislation or in policy. Thirdly, how much land should the beneficiaries in question obtain, given their respective land needs and fourthly, what type of right or benefit should the beneficiaries acquire in relation to the land? The alignment of the concept of redistribution with the concept of broadening access to land provides for an array of available options or benefits that may accrue to beneficiaries. The benefits or rights may include ownership or co-ownership of the land; specific use and/or occupational rights; or even benefits in the form of shares in a farming or agricultural enterprise. These recommendations are explored further in the following Chapter.

6 Conclusion

This Chapter used a thematic methodology to compare the legal position(s) pertaining to (a) the concept of agricultural land; (b) mechanisms for the regulation of agricultural land; (c) mechanisms or approaches for the acquisition of agricultural land; and (d) redistribution in South Africa, Namibia and India. The insights drawn from the jurisdictions are integral in providing guidance and proposals for the way in which South Africa could conceptualise, regulate, acquire and redistribute agricultural land, to the extent that it may be accommodated within the South African constitutional dispensation. The comparison between Namibia, India and South Africa also exposed the difficulties and failures in

[338] 285.
[339] See Chapter 1, 2 2 above.
[340] Pienaar *Land Reform* 283.

conceptualising, regulating, acquiring and redistributing agricultural land and the corresponding reasons for such failure. These are integral for South Africa's way forward. It is in this light that the following Chapter aims to suggest recommendations pertaining to the conceptualisation, regulation, acquisition and redistribution of agricultural land in the South African context specifically.

Chapter 10: Conclusions and Recommendations

1 Introduction

In light of the study as a whole, the aim of this Chapter is to provide conclusions and recommendations in relation to the following themes: (a) the concept of agricultural land; (b) the regulation of agricultural land; (c) the acquisition of agricultural land; and (d) the redistribution of agricultural land in South Africa. Ultimately, the overarching aim of this dissertation was to consider the regulation of agricultural land in South Africa from a land reform, specifically redistribution, perspective in order to assess whether the mechanisms[1] employed are aligned with the Constitution, whether the approaches to acquiring agricultural land, flowing from the regulatory framework are likewise constitutional and whether, combined, an effective legal framework for redistribution in South Africa exists.

2 Summary and conclusions

Chapter 2 aimed to determine what constitutes agricultural land in South Africa and whether a single definition of agricultural land exists. Having regard to the different legislative measures discussed in Chapter 2,[2] it was found that a category of agricultural land exists in South Africa. Most of the legislative measures define agricultural land as a residual category of land, without giving content to what agricultural land is. Defining agricultural land as a residual category means that more agricultural land is available for redistribution purposes in principle. However, not all land falling into this category may be capable of being used for agricultural purposes. Accordingly, in line with the land needs and demands of the beneficiaries, the *purpose* for which the land will be used must also be taken into consideration when defining agricultural land for purposes of redistribution. Accordingly, the concept of agricultural land was further explored as it is defined in Namibia and India in Chapters 7 and 8 respectively. When comparing the definitions of agricultural land in Namibia, India and South Africa, it was found that instead of defining agricultural land in accordance with *where* it is situated, it should be defined in relation to the *purpose* for which it is used or capable of being used.

[1] As discussed in Chapter 3.
[2] The Subdivision of Agricultural Land Act 70 of 1970; the Preservation and Development of Agricultural Land: Policy Framework; the Preservation and Development of Agricultural Land Bill in GN 984 *GG* 40247 of 02-09-2016; and the Regulation of Agricultural Land Holdings Bill in GN 229 *GG* 40697 of 17-03-2017.

Chapter 3 provided for an exposition of existing and newly proposed regulatory mechanisms in relation to agricultural land in South Africa in view of the land reform programme, specifically the redistribution programme.[3] The particular mechanisms explored for purposes of this dissertation included: (a) provisions relating to the subdivision of agricultural land; (b) restrictions on the amount of agricultural land a land owner may own (known as land ceilings) and; (c) restrictions pertaining to foreign ownership of agricultural land. It was found that these regulatory mechanisms not only impact an owner's entitlements in relation to agricultural land, but may also make more agricultural land available for redistribution purposes. While Chapter 3 only provides for an exposition of these regulatory measures and the underlying reason for such regulation, the subsequent chapters dealt with the constitutionality and efficacy of the mechanisms.

Consequently, Chapter 4 in line with the methodology set out in *FNB* aimed to determine whether the imposition of regulatory mechanisms discussed in Chapter 3 arbitrarily deprives a land owner of his or her property. Where a law of general application arbitrarily deprives a land owner of his or her property, such mechanism will be regarded as unconstitutional. In particular it was found that the imposition of restrictions on subdivision of agricultural land is not substantively or procedurally arbitrary, and thus constitutional. In relation to the imposition of land ceilings, it may be concluded that in some cases, depending on the size of the agricultural land holding and the ceiling imposed per district, the deprivation may be arbitrary and therefore unconstitutional if it is found that the burden is excessive. In other cases, it may be that the deprivation is rational or proportionate and therefore not unconstitutional. A determination of the constitutionality of the imposition of land ceilings will only be determinable once the land ceilings have been established. The constitutionality of land ceilings will have to be determined on a case-by-case basis, district per district, having regard to all the factors, criteria and circumstances of the case. Interestingly, Roux suggests that land reform legislation (such as the Regulation Bill for example) is unlikely to be found unconstitutional, as the aim thereof is to promote land reform (and broaden access to land).[4] He argues that where the aim will in all likelihood outweigh the protection of private property rights. In such cases, Roux argues that the excessive regulatory measure should be transformed into and expropriation which requires the State to pay compensation to the

[3] Excluding land tax or property tax measures and mechanisms such as the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997 which regulates and may impact an landowner's entitlements and may open up land for redistribution purposes.
[4] T Roux "Property" in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (RS 2009, OS 2003) 46-1-46-37, 46-24 - 46-25.

affected owner.[5] However, in view of the *FNB*-methodology and the wording of section 25 it seems unlikely that the court will adopt constructive expropriation as a solution. Therefore Bezuidenhout suggests that, where it is not suitable to declare legislation invalid in light of the important regulatory purpose i.e. land reform that it aims to fulfil, land owners should be compensated for the deprivation in the form of "equalisation payments".[6]

In relation to the constitutionality of the restrictions imposed on foreigners owning agricultural land in South Africa in terms of the Regulation Bill, a distinction had to be drawn between (a) restricting foreigners from acquiring ownership of agricultural land in future; and (b) restricting the disposal of agricultural land by foreigners.[7] With regard to the prohibition against foreigners acquiring ownership of agricultural land in future, it was found that section 25(1) only protects existing property rights.[8] The Regulation Bill does not aim to deprive or extinguish a foreign person's ownership of agricultural land. Those foreign persons who acquired agricultural land before the commencement of the Act will accordingly enjoy the protection afforded in section 25(1), whereas foreign persons wanting to acquire agricultural land after the commencement of the Act, will not. In conclusion, the constitutionality of the prohibition against the acquisition of agricultural land by foreigners in future cannot be tested against section 25(1) of the Constitution. In relation to the restrictions on the disposal of agricultural land by foreign persons,[9] it was found that the deprivation does not deprive the foreign owner of all of his or her rights in land. The restriction only affects the foreign owner's right to dispose of his or her property as he or she wishes. In particular, the restriction only proscribes how the owner is to dispose of property. In this regard, the owner is not wholly prevented from disposing of property, but only from selling his or her agricultural land to a buyer of own choice. Accordingly, it can be concluded that the restriction on the disposal of agricultural land by foreigners is non-arbitrary and constitutional, because the Regulation Bill does not impose a disproportionate burden on those affected when weighed against the purpose sought to be achieved, especially where the purpose of the Regulation Bill is land reform.

Having established that the regulatory mechanisms were in all likelihood constitutional, the following Chapter explored the different approaches to acquiring agricultural land for

[5] Roux "Property" in *CLOSA* 46-24 – 46-25.
[6] Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state* 3.
[7] Clause 21 of the Regulation of Agricultural Land Holdings Bill.
[8] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 50.
[9] Clause 21 of the Regulation of Agricultural Land Holdings Bill.

redistribution purposes. In particular, the discussion was limited to an exposition of the following approaches: (a) market-led approaches; (b) expropriation (with or without compensation); and (c) confiscation. It was found that while much controversy exists around *which* approach should be used, it is postulated that a both market-led approaches and expropriation should be used to obtain as much agricultural land for redistribution purposes as possible. The suitability of the approach in acquiring agricultural land was further explored in Chapter 6.

Having set out the legal position pertaining to (a) the concept of agricultural land; (b) the regulation of agricultural; and (c) the acquisition of agricultural land in South Africa, Chapter 6 provided some preliminary thoughts on the efficacy of redistribution as a whole; the extent to which the regulatory mechanisms discussed in Chapter 3 may promote or contribute to the redistribution process as a whole; the most suitable approach in acquiring agricultural land for redistribution purposes; and the redistribution of agricultural land. It was highlighted that the efficacy of the redistribution programme as a whole stems from a lack of (a) a coherent policy or law that gives effect to the right to have access to land; (b) accurate land records and how land is to be identified for redistribution purposes; and clarity of details pertaining to who the beneficiaries ought to be, how they ought to be selected a, what quantity and quality of land they ought to receive and what type of right they ought to receive in relation to the land. Furthermore, it was found that the success of the redistribution programme may be measured against targets or criteria. It was argued that all three regulatory mechanisms discussed in Chapter 3 may contribute towards the aims and objectives of the redistribution programme, provided that a suitable management framework or system is developed to ensure or contribute to the effective implementation of the regulatory mechanisms. In relation to the most suitable approach, it was found that both market-led approaches and expropriation should be used as a means of acquiring agricultural land for redistribution purposes. It was also found that a comparative perspective may be useful to develop and expand on these preliminary findings.

Accordingly, the next part of the dissertation provided for a legal comparative analysis. In particular, the following chapters provided for an exposition of (a) the concept of agricultural land; (b) the regulation of agricultural land and (c) the acquisition of agricultural for redistribution purposes in Namibia and India respectively. These chapters laid the foundational basis for an in-depth legal comparative perspective in Chapter 9. Similar to the previous chapters, a thematic methodology was used to compare the legal position(s)

pertaining to (a) the concept of agricultural land; (b) mechanisms for the regulation of agricultural land; (c) approaches for the acquisition of agricultural land and (d) redistribution in South Africa, Namibia and India. The insights drawn from the jurisdictions are integral in providing guidance and proposals for the way in which South Africa should conceptualise, regulate, acquire and redistribute agricultural land, to the extent that it may be accommodated within the South African constitutional dispensation. Accordingly, the following section set out the recommendations flowing from the comparative analysis in Chapter 9.

3 Recommendations

3 1 A proposed definition of agricultural land in South Africa

The determination of a coherent and technical legal concept of agricultural land is important as a starting point for the regulation thereof. It is therefore proposed that there should be one, uniform definition for agricultural land in South Africa. The comparative analysis provided for in Chapter 9 has provided some insight into formulating or conceptualising a uniform definition of agricultural land in the South African context. Currently, "agricultural land" is defined as a residual category. However, not all land forming part of this residual category is capable of being used for agricultural purposes. Accordingly, where there is a need by a beneficiary under the redistribution programme for land for agricultural purposes, the beneficiary may not obtain land suitable for agricultural purposes if the definition in SALA remains operational. Within the South African context, the concept of agricultural land needs to be formulated widely, so as to not limit the application of the regulatory mechanisms aimed at promoting or contributing towards redistribution. The definition of agricultural land should also allow for situations where the nature and/or purpose of the land may change over time. For example, land may become arable over time due to changing climate conditions. In this regard, land that was previously deemed to be non-agricultural land, may become agricultural land and *vice versa*.

Similar to the proposed concept of agricultural land in the Namibian Land Bill and under the different Indian State land-ceiling legislation, it is proposed that agricultural land in South Africa should not be defined as a residual category of land. Instead, it should be defined widely, at a national level, as: Any land that is used for or capable of being used for (a) agricultural purposes; or (b) agriculture.

Given South Africa's topography and current and/or changing climatic conditions, it is proposed that each province, similar to a State in India, should provide in legislation or policy, what constitutes "agricultural purposes" or "agriculture" for that region. Accordingly, a national or overarching concept of agricultural land would exist in South Africa, while it is proposed that the details pertaining to what constitutes "agricultural purposes" or "agriculture" are left to the relevant provincial legislator or policy maker. Each province, given its specific climatic conditions and land capabilities, should provide for a list of "agriculture purposes" or for a definition of "agriculture", as set out in each Indian's State's legislation. In this way, the focus would not fall on where the land is situated, but rather on the purpose for which it is used or can be used.

In line with the proposal that there should be a uniform definition of agricultural land, it is also proposed that there should be one piece of legislation regulating agricultural land. This proposal is dealt with in the next section.

3 2 A legal framework for the regulation of agricultural land in South Africa

3 2 1 Introduction

As mentioned in Chapter 1,[10] in the process of broadening access to land, agricultural productivity and food security may not be compromised. It is within this context, that it is proposed that an overarching legal framework for the regulation of agricultural land in South Africa should be formulated. Given the array of problems identified with the formulation, implementation and administration of the ceiling legislation in India, it is proposed that the South African government have two options in relation to the Regulation Bill: Firstly, the Regulation Bill, or specifically the provisions dealing with agricultural land ceilings, should be scrapped and alternative regulatory measures for redistribution should be explored. This would require exploring different ways of identifying, acquiring and redistributing agricultural land. Alternatively, if it is not scrapped, the Regulation Bill in its current form requires further amendments to address the problems identified with the formulation and implementation of the ceiling legislation. In this regard, it is furthermore proposed that the regulatory mechanisms, and other aspects, proposed by the Preservation Bill[11] and the Regulation Bill[12] be comprised into one Agricultural Land Bill regulating agricultural land for redistribution purposes, while taking into account the need to preserve agricultural land for

[10] See Chapter 1, 1 above.
[11] Under the administration of the former Department of Agriculture, Forestry and Fisheries.
[12] Under the administration of the former Department of Rural Development and Land Reform.

present and future generations. Given the newly reconfigured national executive following the May 2019 elections,[13] both the Preservation Bill and the Regulation Bill will fall under the newly formed DALRRD. A new legal framework for the regulation of agricultural land also requires an effective land administration system which entails, *inter alia*, (a) the establishment of (i) a National Land Commission; and (ii) nine Provincial Land Commissions, monitored by the National Land Commission; (b) strengthening and enhancing the capacity of the LLC and (c) clarifying the respective roles between the OVG and the court. See Annexure B for an exposition of the different institutions and respective roles in light of the proposed legal framework for the regulation and redistribution of agricultural land in South Africa.

3 2 2 An agricultural land register

Currently, there are two opposing bills that provide for different purposes and different mechanisms to regulate agricultural land in South Africa, namely the Regulation Bill and the Preservation Bill. The Regulation Bill aims to make more agricultural land available for redistribution purposes, while the Preservation Bill aims to preserve agricultural land. In short, the Regulation Bill aims to broaden access to agricultural land by imposing land ceilings and by placing restrictions on foreign ownership of agricultural land and the Preservation Bill, *inter alia*, prohibits subdivision and allows for the creation of protected agricultural areas. While the aims of the Regulation Bill and Preservation Bill differ, both allow for the establishment of a national agricultural land register.[14]

On the one hand, the Regulation Bill proposes that a register be developed and maintained to determine the race and gender of all agricultural land owners in South Africa.[15] In principle, this will allow the South African government to monitor the distribution and redistribution of agricultural land in the country. On the other hand, the Preservation Bill provides for the establishment of a national agricultural land register to provide data and information on, *inter alia*, "the capability, suitability, potential, status and use" of agricultural resources, including land,[16] for the preservation, sustainable use and management of agricultural land. This register will be useful for the determination of land ceilings which

[13] The Presidency "President Ramaphosa announces reconfigured departments (14 June 2019) <http://www.thepresidency.gov.za/press-statements/president-ramaphosa-announces-reconfigured-departments> (accessed 08-13-2019).
[14] Chapter 5 of the Preservation and Development of Agricultural Land Bill and Chapter 3 of the Regulation of Agricultural Land Holdings Bill.
[15] Chapter 3 of the Regulation of Agricultural Land Holdings Bill.
[16] Clause 46(1)(iii) of the Preservation and Development of Agricultural Land Bill.

require the consideration of various criteria and factors, including (a) land capability factors (essentially high, medium or unique agricultural land, matters pertaining to production output, variations in physical potential in terms of soil type, and the relationship between resources); (b) capital requirements of different enterprises; (c) measure of expected household and agro-enterprise income; (d) annual turnover; and (e) the relationship between product prices and price margins.[17] In this way, a combined register of ownership of agricultural land and the capability and suitability of agricultural land will contribute to the effective implementation of land ceilings. While the Regulation Bill proposes that the establishment, administration and maintenance of such a register will be the responsibility of the National Land Commission, it is proposed instead that nine Provincial Land Commissions be created to compile an Argricultural Land Register per province. The overarching role of the National Land Commission will then be to oversee and maintain a National Agricultural Land Register, comprised out of the nine Provincial Agricultural Land Registers.

3 2 3 The subdivision of agricultural land in South Africa

Despite the arguments for and against subdivision as a restraint against redistribution of agricultural land[18] and the proposal by the *Land Reform Report* that SALA should be repealed[19] restrictions on subdivision of agricultural land may play a pivotal role in the (potential and) successful implementation of land ceilings in South Africa. The prohibition against the subdivision of agricultural land in SALA and the Preservation Bill ensures that ceiling surplus agricultural land is not transferred to unintended beneficiaries of the redistribution programme. In other words, the restrictions against subdivision of agricultural land in SALA and the Preservation Bill, do not pose a restraint to redistribution, but rather ensure that land owners do not transfer parcels of agricultural land to persons such as relatives who are not considered to be beneficiaries of the redistribution programme by the South African government. The restriction against subdividing agricultural land and the important implications it has for the operation of land ceiling legislation in South Africa is discussed further below.

[17] Clause 25 of the Regulation of Agricultural Land Holdings Bill.
[18] See Chapter 3, 3 2 4 above.
[19] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 30-07-2019) 58 proposes that the President should sign the Subdivision of Agricultural Land Repeal Act 64 of 1998 into law.

3 2 4 Agricultural land ceilings in South Africa

The imposition of land ceilings in India has generally not led to any effective redistribution of agricultural land, but instead, aggravated India's existing problem of uneconomical fragmented land holdings, which has led to a general decline in agricultural productivity[20] and which poses a risk to food security. However, effective mechanisms which are formulated correctly and which set lower ceilings thus make more land available for redistribution, without compromising agricultural productivity.[21] In the process of broadening access to land, it is therefore proposed that certain safeguards for the preservation of agricultural land be put into place while still providing for the imposition of land ceilings in South Africa. As mentioned in Chapter 9 above,[22] it may be necessary as proposed by the Preservation Bill to make provision for a schedule of "protected agricultural areas"[23] in the proposed Agricultural Land Bill. In light of the need to preserve agricultural land and ensure food security, it is proposed that these areas be exempted from the imposition of land ceilings. However, these types of agricultural land may still be expropriated as a whole and redistributed to competent beneficiaries, provided that the land is used for agricultural purposes. In this way, redistribution is still effected without causing fragmentation of prime agricultural land.

The first phase of the implementation of land ceilings in India allowed for various loopholes in the formulation of the ceilings legislation. These loopholes allowed land owners, in anticipation of the implementation of land ceilings, to circumvent the legislation by either (a) reclassifying their land to fall outside the scope of the ceiling legislation; and/or (b) by transferring parcels of their land by way of sale, gift or partition (subdivision) to relatives and friends. By transferring parcels of their land, the land owner's land fell within the ceiling limit (often set too high), thereby allowing them to circumvent the operation of the land ceiling legislation. Only after the proposals in national guidelines in 1972 on the formulation of the land ceiling legislation, did the implementation of the legislation contribute to the

[20] C Ashokvardhan *Ceiling Laws in India* (2005) 9; T Hanstad, R Nielsen, D Vhugen & T Haque "Learning from old and new approaches to land reform in India" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.
[21] See Chapter 1, 1 above.
[22] See Chapter 9, 3 5 1 above.
[23] Clause 1 of the Preservation and Development of Agricultural Land Bill defines a "protected agricultural area" as: "(a) an agricultural land use zone, protected for purposes of – (i) food production; and (ii) ensuring that high value agricultural land are protected against non-agricultural land uses in order to promote long-term agricultural production and food security; (b) includes all areas demarcated as such in accordance with section 15; and (c) may include high value agricultural land and medium value agricultural land".

redistribution of land in India.[24] It is accordingly proposed that the provisions of the Regulation Bill be amended to prevent such circumvention by South African land owners. These concerns are considered below in more detail. Other concerns such as (a) setting the ceiling limit too high; and (b) whether the ceiling limit should apply to individual or family holdings as a unit are also considered below. While the formulation of compensation was considered to be a reason for the failure of the land ceiling legislation in India, it is discussed further in identifying a suitable approach for acquiring agricultural land in South Africa below.[25] Ultimately, as mentioned above, it is recommended that further amendments to the land ceiling legislation are required for its effective implementation in South Africa.

3 2 4 1 The formulation of agricultural land ceiling legislation in South Africa

To prevent land owners from possibly circumventing the application of land ceiling legislation in South Africa, it is proposed that the following amendments be made to the formulation of the Regulation Bill:

Firstly, the inadequate definition of agricultural land which allowed land owners in India to re-classify their land to fall outside the scope of ceiling legislation, should be addressed in the Regulation Bill.[26] As mentioned above,[27] it is proposed that agricultural land should be formulated widely. While the current formulation of agricultural land is formulated widely in SALA, it is opined that agricultural land should be defined in accordance with its (potential) use and not in relation to where it is situated. It would be ineffective if a land ceiling were imposed on agricultural land as a residual category, but the ceiling-surplus land ("redistribution agricultural land") was of a non-arable nature. The wide formulation of agricultural land will prevent land owners from reclassifying their land to fall outside the scope and application of the ceiling legislation.[28]

Secondly, and in relation to the first proposal, the large number of exemptions listed in the land ceiling legislation in India, which also allowed land owners to reclassify their land to fall

[24] M Sethi "Land reform in India: Issues and challenges" in P Rosset, R Patel & M Courville (eds) *Promised Land: Competing Visions of Agrarian Reform* (2006) 73-92, 75.
[25] See 3 3 4 below.
[26] T Hanstad & J Brown "Land reform law and implementation in West Bengal: Lessons and recommendations" (2001) *Rural Development Institute Report No.112* 1-66, 26; T Besley & R Burgress "Land Reform, Poverty Reduction and Growth: Evidence from India" (2000) 115 *The Quarterly Journal of Economics* 389-430, 389, 394.
[27] See 3 1 above.
[28] Besley & Burgress (2000) *The Quarterly Journal of Economics* 394.

outside the scope of the legislation, should be considered.[29] While there are no listed exemptions in the Regulation Bill, the Bill provides that "the Minister may determine special categories of ceilings and exempt a particular category of agricultural land holding"[30] from the operation of the land ceilings. It is accordingly recommended that the list of exemptions be kept at a minimum and that parameters for the Minister's discretion be formulated. In particular, it is also proposed that "protected agricultural areas"[31] be exempted from the operation of the land ceiling legislation, to address concerns over food security and agricultural productivity.

The "protected agricultural areas"[32] may include: (a) agricultural land use zones protected for purposes of long-term agricultural production and food security which ensures that high value agricultural land is protected against non-agricultural land use; (b) areas which are declared as a "protected agricultural area" for the purposes of crop or livestock production by the Minister by notice in the *Gazette*; and (c) "high value agricultural land", defined as:

> "land best suited to, and capable of, consistently producing acceptable levels of goods and services for a wide range of agricultural enterprises in a sustainable manner, taking into consideration expenditure of energy and economic resources".[33]

While the Preservation Bill makes provision for the procedures declaring and reviewing protected agricultural areas,[34] it does not stipulate the criteria which the Minister must take into account in determining "protected agricultural areas". Arguably, such criteria need to be set out in regulations.

Thirdly, where the land ceiling legislation did not have retrospective effect, land owners in India resorted to partitions and fictitious transfers to circumvent the ceiling limits and consequently the legislation. However, West Bengal's land ceiling legislation prohibited transfers and partitions retrospectively. In particular, the WBLRA provides that land transferred by sale, gift or otherwise partitioned by a *raiyat* after the 7th of August 1969, but before the publication of the West Bengal Land Reform (Amendment) Act shall be taken into

[29] PS Appu *Land Reforms in India: A Survey of Policy, Legislation and Implementation* (1996) 154; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 15, 28.
[30] Clause 25(1)(c) of the of the Regulation of Agricultural Land Holdings Bill.
[31] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[32] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[33] Clause 1 of the Preservation and Development of Agricultural Land Bill.
[34] Clauses 16 and 17 of the Preservation and Development of Agricultural Land Bill.

account in determining the ceiling area, as if the land had not been transferred or partitioned.[35] The Act also provides that this provision shall not apply to *bona fide* transfers or partitions and that the onus of proving such a transfer or partition shall lie with the transferor.[36] Furthermore, the transfer or partition will be deemed to be *mala fide* if the transfer or partition was made in favour of the transferor's relatives.[37] In this regard, it is proposed that the land ceiling legislation in South Africa should also provide for prohibiting transfers retrospectively.

The Regulation Bill, in its current form, does not provide for prohibiting transfers retrospectively. The Regulation Bill only provides that "any agreement to acquire or dispose of agricultural land is void, in so far as it purports to exclude, or to limit, any provision of this Act"[38] from the date of commencement of the Act. It may be pivotal for the effective and successful use of land ceilings to include a provision in the Regulation Bill that prohibits the transfer of agricultural land retrospectively. As suggested in Chapter 9, the Regulation Bill in relation to the operation of land ceilings specifically, may provide that it operates retrospectively from the date it was published for comment namely, 17 March 2017. In this way, agricultural land transferred from the date 17 March 2017 to the date of commencement of the Regulation Bill shall be taken into account in determining the ceiling area, as if the land had not been transferred.[39] The Regulation Bill should also, like the West Bengal Land Reform Act, provide for *bona fide* transfers in this regard. This may prevent land owners from resorting to *mala fide* subdivisions and fictitious transfers of agricultural land, before the promulgation and implementation of the Regulation Bill.

As mentioned above,[40] restricting the subdivision of agricultural land also plays an important role in the implementation of land ceilings. These restrictions ensure that land owners do not transfer ceiling-surplus agricultural land to unintended beneficiaries, such as relatives. In other words, if subdivision is allowed in principle, as proposed by the *Land Reform Report*,[41] then it allows land owners the opportunity to circumvent the ceiling limit, by subdividing and transferring ceiling-surplus agricultural land to persons who are not

[35] Section 14P(1) of the West Bengal Land Reforms Act 10 of 1956.
[36] Section 14P(2) of the West Bengal Land Reforms Act 10 of 1956.
[37] Section 14P(2) of the West Bengal Land Reforms Act 10 of 1956 provides that relatives are regarded as the transferor's wife, husband, child, grand child, parent, grandparent, brother, sister, brother's son or daughter, sister's son or daughter, daughter's husband or son's wife, wife's brother or sister, brother's wife.
[38] Clause 3(2) of the Regulation of Agricultural Land Holdings Bill.
[39] Section 14P(1) of the West Bengal Land Reforms Act 10 of 1956.
[40] See 3 2 3 above.
[41] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 58.

considered to be beneficiaries of the redistribution programme in South Africa. Accordingly, in formulating a new Agricultural Land Bill for the regulation of agricultural land, which will include the imposition of land ceilings, it is important that restrictions on the subdivision of agricultural land as proposed by the Preservation Bill be kept in place. SALA (a pre-constitutional Act) may be repealed, but the provisions regulating subdivision should be revived in the new proposed Bill. In summation, these recommendations will act as a safeguard against land owners trying to circumvent the operation of the land ceiling legislation in South Africa, which in turn, will contribute towards more land being made available for redistribution.

Other concerns such as (a) setting the ceiling limit too high; and (b) whether the ceiling limit should apply to individual or family holdings as a unit should also be considered in formulating the land ceiling legislation. In relation to the former concern, the higher the ceiling, the less land could be identified as ceiling-surplus land, which also resulted in less land being available for redistribution.[42] In this regard, the Regulation Bill in its current form does not provide for one ceiling limit applicable to all agricultural land in South Africa. Instead, the ceiling limit is determined per district or region, having regard to the various criteria and factors as discussed in Chapter 3.[43] It remains to be seen what the ceiling limit, per district or region will be in South Africa. However, in general and in line with the approach in West Bengal, it is recommended that the ceiling limit should be low, rather than high, provided that the criteria and factors listed in the Regulation Bill for the determination of the ceiling limit allow for it. In relation to the latter concern, the Regulation Bill provides that the ceiling should apply to individual private and public land owners, including natural, juristic and foreign persons, and not to a family unit or holding. As suggested previously, it may be too difficult to formulate a standardised concept of "family" in South Africa or to limit the number of family members to five to constitute a unit or holding, as is the case in West Bengal.[44] Accordingly, it is acknowledged that further research and consideration of this aspect in formulating land ceiling legislation in South Africa is needed before such legislation is promulgated.

Accordingly, these recommendations in relation to the formulation of land ceiling legislation could very well prevent South Africa from making the same mistakes identified by the 1972

[42] See Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 28.
[43] See Chapter 3, 3 3 3 1 7 above.
[44] NC Behuria *Land Reforms Legislation in India: A Comparative Study* (1997) 133.

national guidelines in India. Ultimately, the formulation suggested above may help in ensuring that agricultural land is redistributed effectively, without impacting negatively on agricultural productivity and ensuring food security for present and future generations in South Africa. Importantly, even if agricultural land ceilings are not used as regulatory measures to broaden access to land, the criteria used to determine the land ceilings are still useful as criteria to identify suitable agricultural land for acquisition.

3 2 4 2 The implementation of agricultural land ceilings

Apart from the formulation of legislation regulating agricultural land for redistribution purposes in South Africa, the effective use of land ceilings also depends on the South African government's effective implementation thereof.[45]

> "Policies and laws cannot reach their potential without the political will to implement and a state that has the capacity and heart to function and deliver to its people. It is important that the land reform process is not captured by individuals or families, monopolies or private sector corporations".[46]

Section 25(5) of the Constitution mandates the South Africa government, not individuals, families, monopolies or private sector corporations, to broaden access to land. It is therefore proposed that South Africa requires an effective land administration system characterised by (a) a strong political will on the part of the executive, specifically the DALRRD, to implement and monitor compliance with land ceiling legislation;[47] (b) a clear and effective administrative process, governed by a competent body, such as the establishment of a National Land Commission and nine Provincial Land Commissions, for the acquisition and redistribution of agricultural land; (c) an effective mechanism for resolving land disputes timeously dealing with *inter alia* the classification of land and determining whether the land constitutes ceiling-surplus land and the determination of just and equitable compensation;[48] and (d) sufficient capacity and resources to undergird the relevant mechanisms.

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[45] Sethi "Land reform in India: Issues and challenges" in *Promised Land: Competing Visions of Agrarian Reform* 75; Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246-248.

[46] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 105.

[47] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 247-248; Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) vi.

[48] Government of India, Ministry of Rural Development, Department of Land Resources *Draft National Land Reforms Policy* (18 July 2013) 25 provides that the absence of a common adjudicatory body and uniform procedure is leading to complexities and delays in the settlement of land disputes. See also Government of

While each Provincial Land Commission is responsible for determining what constitutes "agricultural land" and what the ceiling limit should be in a particular province, disputes may arise pertaining to: (a) the categorisation of "agricultural land"; (b) whether certain land is exempted from the operation of the land ceiling legislation; and (c) the determination of compensation for agricultural land (including ceiling-surplus land) acquired for redistribution purposes. A specialised forum, which has the capacity to deal with these matters, is required. The LCC specialises in disputes that arise out of laws[49] that underpin the South African land reform initiative. However, the LCC primarily deals with land restitution or land claims and claims or disputes arising out of the Labour Tenants (Land Reform) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997. In light of the proposed Agricultural Land Bill, it is proposed that the LCC should be renamed as the "Land Court"[50] to adjudicate on redistribution disputes, including (a) matters dealing with the regulation of agricultural land for redistribution purposes in general; and (b) disputes related to the imposition of land ceilings in particular as listed above. In particular, the role and interplay between the OVG and the Land Court in determining compensation for land acquired for land reform purposes is discussed below.[51] Importantly, the Land Court must have the *capacity* to deal expeditiously with land reform matters. In particular it is proposed that a permanent judge president and at least four permanent judges are appointed to the Land Court.[52]

3 2 5 Restrictions on foreign ownership of agricultural land in South Africa

The Regulation Bill, in comparison to the Namibian position, provides for more stringent restrictions on foreign ownership in light of the constitutional mandate to broaden access to land to citizens. When viewed in light of the constitutional mandate, the restrictions on the disposal of agricultural land owned by foreign persons and the prohibition on acquiring agricultural land in future seem to be a logical step. However, it is possible that this form of legal redress may have an adverse impact on foreign investment in South Africa. Accordingly, it may be prudent for South Africa to consider amendments to the Regulation

India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27.

[49] Restitution of Land Rights Act 22 of 1994; the Land Reform (Labour Tenants) Act 3 of 1996; and Extension of Security of Tenure Act 62 of 1997, *inter alia*.

[50] G Davis "Modernising SA Courts among Lamola's top priorities" <https://ewn.co.za/2019/07/03/moderinising-sa-courts-among-ronald-lamola-s-top-priorities> (accessed 04-08-2019). See also Address by Minister Ronald Lamola, MP Minister of Justice and Correctional Services at the occasion of the budget debate of the Office of the Chief Justice, July 2019, National Assembly, Cape Town (17 July 2019) <https://www.gov.za/speeches/budget-debate-office-chief-justice-17-jul-2019-0000> (accessed 04-08-2019).

[51] See 3 3 5 2 below.

[52] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 81.

Bill pertaining to foreign ownership of agricultural land. In light of the Namibian position under ACLRA, the acquisition of foreign ownership may still be prohibited. However, it is proposed that such a prohibition should not be absolute[53] and should rather be subject to an application and approval process.[54] Similar to the position in Namibia as set out in ACLRA, prior written consent from the Minister should be required for foreigners to acquire ownership or occupy agricultural land for 10 years or longer. It is proposed that the Minister should grant his or her consent if there is sufficient evidence that (a) the acquisition of the land will constitute an eligible investment in terms of the Protection of Investment Act 22 of 2015; (b) the land is capable of being used or occupied in a beneficial manner for the purpose which the foreigner aims to use or occupy; and (c) the use or occupation of the land in question will not have an adverse effect on the environment. In this way, less restrictive means may be used to receive the same result, without compromising foreign investment. In other words, less restrictive proposed regulations will still restrict foreigners from acquiring ownership of agricultural land, thereby allowing South African citizens to gain access to agricultural land, as provided for in section 25(5) of the Constitution.

3 3 A legal framework for the redistribution of agricultural land in South Africa

3 3 1 Introduction

At an overarching level, it is clear that there is no coherent framework, policy or law that provides for the redistribution of agricultural land in South Africa.[55] The lack of such a policy or law makes it exceedingly difficult to measure and determine the success of the redistribution programme. The difficulty in measuring the effectiveness or the success of the redistribution programme as a whole stems from the lack of a coherent framework, policy or law that (a) provides accurate data regarding (i) the question of who owns what land in South Africa; (ii) what the land demands or needs are of South Africans; (b) how (agricultural) land is identified for redistribution purposes; (c) what the most suitable approach in acquiring (agricultural) land for redistribution, including the determination of compensation, is; (d) questions regarding the redistribution process, namely: (i) the content of the right in section 25(5) of the Constitution; (ii) who the beneficiaries ought to be; (iii) how they ought to be selected; (iv) what quantity of agricultural land they ought to receive and; (v) what type of

[53] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 61.
[54] Section 58(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
[55] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 93-94. See also *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019).

rights the beneficiaries of the redistribution programme ought to receive. Without this information viable targets or criteria for measuring and monitoring the success of the redistribution programme cannot be formulated. Moreover, the establishment and cooperation between various functionaries and institutions at various stages of the redistribution process are also necessary for the effective implementation of such a redistribution framework. See Annexure A and B for an exposition of the different phases of the proposed legal framework for the redistribution of agricultural land in South Africa, and the corresponding institutions responsible for administering the respective phases.

3 3 2 A national land audit

Land is a finite resource, which means that there is only a certain amount of land available for redistribution. From the outset, it needs to be determined how much land is available for redistribution. The *White Paper* provided that:

> "The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods…Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers".[56]

It is therefore proposed that a National Land Commission, as envisaged by the Regulation Bill, be established to conduct a national land audit that is correct and reliable to determine who owns what land in South Africa. Such an endeavour will require cooperation with the Registrar of the Deeds Office. While the redistribution programme has mainly focused on agricultural land, the redistribution programme should focus on the redistribution of urban and rural, including agricultural land.[57] Therefore, while the focus of this dissertation is on the redistribution of agricultural land in particular, it is acknowledged that the national land audit and redistribution programme as a whole should not only focus on agricultural land, but on urban and rural land in general. Once it is determined who owns what land in South Africa, the needs and demands of potential beneficiaries need to be determined.

3 3 3 A national land demand or need survey

Coupled with the need for a national land audit, is the need for a national land demand or need survey conducted at national level, by the proposed National Land Commission.[58]

[56] Department of Land Affairs, *The White Paper on South African Land Policy* (1997).
[57] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 33.
[58] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 56.

Currently, there is "no adequate system for engaging with land demand" [59] or land need. The data obtained should be "categorised into different categories of land demand, mapped across different regions".[60] To this extent, the redistribution programme is demand-driven, because it relies on the beneficiaries, as opposed to the State, to identify their land needs. In this regard, land demand may be categorised according to settlement orientated needs and/or farming orientated needs. Farming orientated needs can further be categorised into land needed for subsistence; small-; medium- and large-scale farming. Aliber notes that the size of the land awarded and the type of rights acquired in relation to the land will depend on the category of land need or demand.[61] These aspects are discussed further below. Establishing what the land needs and demands are may also assist in identifying suitable (agricultural) land for redistribution. The *Land Reform Report* states that:

> "Decisions about which land to acquire can only be taken on the basis of an understanding of who wants and needs land, what kind of land and for what purposes".[62]

While it is acknowledged that the identification of suitable land for the differential land needs and demands relate to urban and rural land, the recommendations will henceforth only focus on agricultural land. In line with the needs and demands of potential beneficiaries as determined by the national survey, suitable agricultural land for redistribution needs to be identified once the national land audit is completed.

3 3 4 Identifying suitable agricultural land for redistribution

One of the most important aspects highlighted in the *Kessl*-judgment is that a uniform and clear approach to identifying (agricultural) land for acquisition for redistribution purposes is required. Accordingly, for the sake of a transparent, procedurally fair and effective redistribution process in South Africa, guidelines regarding objective, non-arbitrary criteria for identifying suitable agricultural land for redistribution purposes should be developed and provided for in regulations or policy.[63] For example, in Namibia a set of regulations which

[59] 55.
[60] 56.
[61] M Aliber "How can we promote a range of livelihood opportunities through land redistribution" (13 March 2019) *Working Paper 58 PLAAS*, UWC, Cape Town <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/4654/wp_58_promote_livelihood%20_opportunity_land_redistribution.pdf?sequence=1&isAllowed=y> (accessed 13-08-2019) 1-21, 7.
[62] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 55.
[63] JM Pienaar "Willing-seller-willing-buyer and expropriations as land reform tools: What can South Africa learn from the Namibian experience?" (2018) 10 *Namibian Law Journal* 41-64, 62.

provide for (a) identification criteria;[64] and (b) suitability criteria[65] are used in selecting agricultural land eligible for expropriation. In Namibia, "suitability" means that the land must be suitable for settlement (residential) and farming purposes.

As discussed in Chapter 3 and above, the Agricultural Land Bill makes provision for the imposition of land ceilings on all agricultural land. In principle, any land regarded as ceiling-surplus land, even if the land is owned by a Black person, will be available to be expropriated and redistributed. However, as mentioned in Chapter 3, such land may not be suitable for redistribution or agricultural purposes. Therefore, identification and suitability criteria have to be developed and provided for as regulations to the proposed Agricultural Land Bill. The identification criteria would include ascertaining whether the agricultural land (a) has any condition endorsed on the title deed thereof;[66] (b) is owned by (i) a South African citizen or foreign national[67] and (ii) a natural or juristic person;[68] (iii) a Black or White person; (iv) a male or female; (c) is managed and by whom;[69] (d) leased;[70] (e) abandoned by the owner;[71] (f) neglected or under-utilised;[72] and (g) will contribute to the utilisation of adjacent State land.[73]

Some, if not all, of this information will be easily obtainable once the Agricultural Land Register, as proposed above, is created. While the National Land Commission is envisaged to conduct the national land audit, it is proposed that nine Provincial Land Commissions be created to compile an Agricultural Land Register per province. This is in line with the recommendation that "agricultural land", specifically the definition of "agricultural purposes" or "agriculture", and the corresponding ceiling limits should be determined for each province given South Africa's diversified topography. Under the proposed Agricultural Land Bill (a combination of the Regulation and Preservation Bills), land owners are required to disclose their, *inter alia*, (a) race, as Black, Indian, Coloured, White or other; (b) gender, as male or female; (c) nationality; (d) the size and use of the land; (e) any real right registered against and licence allocated to the agricultural land; and (f) any other information as may be

[64] Regulation 2(1)(a) on criteria to be used for expropriation of agricultural land GN 209 of 2016 *GG* 6115 (1 September 2016).
[65] Regulation 2(1)(b) on criteria to be used for expropriation of agricultural land.
[66] Regulation 3(2)(a) on criteria to be used for expropriation of agricultural land.
[67] Regulation 3(2)(b) on criteria to be used for expropriation of agricultural land.
[68] Regulation 3(2)(c) on criteria to be used for expropriation of agricultural land.
[69] Regulation 3(2)(d)(i) on criteria to be used for expropriation of agricultural land.
[70] Regulation 3(2)(d)(ii)) on criteria to be used for expropriation of agricultural land.
[71] Regulation 3(2)(d)(iii) on criteria to be used for expropriation of agricultural land.
[72] Regulation 3(2)(d)(iv) on criteria to be used for expropriation of agricultural land.
[73] Regulation 3(2)(d)(vi) on criteria to be used for expropriation of agricultural land.

prescribed,[74] which should include whether the land is leased and managed and by whom. The other considerations above, such as whether the land is abandoned by the owner;[75] (f) neglected or under-utilised;[76] and/or (g) will contribute to the utilisation of adjacent State land[77] will have to be determined by the Provincial Land Commission. For example, owners of agricultural land who are citizens of South Africa should be less likely to be expropriated for redistribution purposes than foreigners. Abandoned and neglected or under-utilised land will also be more likely to be expropriated for redistribution purposes.

The determination of the ceiling limit considers criteria such as: (a) the size of the agricultural land;[78] (b) the location of the land;[79] (c) the infrastructure on the land;[80] and (d) the climate, relief and soil of the land.[81] Therefore, any land falling above the ceiling limit will be *suitable* in principle, for acquisition for redistribution purposes. In this way, the imposition of a land ceiling inherently identifies suitable agricultural land for redistribution purposes. However, as mentioned above, even if the agricultural land ceilings are not implemented, the criteria used to determine the land ceiling will in any event be useful in identifying suitable agricultural land for redistribution purposes. For example, factors such as the land capability and capital requirements (infrastructure) are useful in determining whether the land is suitable for acquisition for redistribution purposes. Similarly the criteria in the "Regulations on Criteria to be used for Expropriation of Agricultural Land" in Namibia also provide guidelines on identifying suitable land.

Furthermore, as highlighted by the position in India,[82] the impact that the acquisition of the agricultural land may have must also be taken into account in determining the suitability thereof for redistribution purposes. For example, the number of families likely to be displaced and the costs of minimising displacement should be included in the identification or suitability criteria. Alternatively, the Provincial Land Commission should conduct a social impact assessment before considering the identification of suitable agricultural land for redistribution. Furthermore, it is also postulated that each Provincial Land Commission

[74] Clauses 1(4) and 15 of the Regulation of Agricultural Land Holding Bill.
[75] Regulation 3(2)(d)(iii) on criteria to be used for expropriation of agricultural land.
[76] Regulation 3(2)(d)(iv) on criteria to be used for expropriation of agricultural land.
[77] Regulation 3(2)(d)(vi) on criteria to be used for expropriation of agricultural land.
[78] Regulation 4(1)(a) on criteria to be used for expropriation of agricultural land.
[79] Regulation 4(1)(b) on criteria to be used for expropriation of agricultural land.
[80] Regulation 4(1)(c) on criteria to be used for expropriation of agricultural land.
[81] Regulation 4(1)(d) on criteria to be used for expropriation of agricultural land.
[82] Sections 4-8 of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.

create a rehabilitation and resettlement scheme. In light of the social impact assessment, such a scheme should include an estimation of the affected families and the number of families among them likely to be displaced; steps that will be taken by the Commission to minimise displacement; employment opportunities to be allocated to the affected family, etc.[83]

Each piece of agricultural land is then evaluated in accordance with these criteria and awarded a weighted score. The regulations should provide for a checklist and formula to determine whether the agricultural land is either highly suitable; suitable; moderately suitable; or not suitable for redistribution purposes.[84] It is acknowledged that the scoring system may not be the best way of identifying suitable agricultural land for redistribution purposes, but it will, at the very least, ensure that there is a transparent and procedurally fair procedure. Once land is identified as suitable for redistribution, it has to be valued and acquired by the State.

3 3 5 A suitable approach to acquiring agricultural land for redistribution

3 3 5 1 Introduction

Once agricultural land is identified as suitable for redistribution purposes, the Minister of Agriculture, Land Reform and Rural Development or a delegate must acquire the land. While Chapter 5 provided for an exposition of the approaches to acquiring agricultural land, Chapter 6 considered which approach would be most suitable for acquiring agricultural land for redistribution. To be considered as a suitable approach, the approach in question must at the very least be constitutional. Accordingly, in line with the Constitution, confiscation of agricultural land for redistribution purposes is not regarded as a constitutionally permitted approach to acquiring agricultural land. As provided for in Chapter 5, both market-led approaches and expropriation are constitutionally endorsed methods of acquiring agricultural land for redistribution purposes. To determine which approach is more suitable, both the efficacy and the affordability of each approach were considered further. It was proposed that a combination of approaches, particularly market-led approaches and expropriation[85] should be used to acquire agricultural land for redistribution.[86] The

[83] Section 4(4) of the Rehabilitation and Resettlement Policy, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013.
[84] See Chapter 7, 4 3 5 above in this regard.
[85] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 79.
[86] 79; Pienaar *Land Reform* 361.

combination of approaches will, in principle, allow for the acquisition of more and better suited land for redistribution.

However, acquired property at market value or at an inflated price makes the cost of acquiring agricultural land too high,[87] which in turn would make the acquisition of agricultural land unsustainable.[88] Therefore, the main problem with market-led approaches and expropriation is that it is too costly for the government to sustain, given the budget allocated for land reform.[89] Therefore, coupled with the acquisition of agricultural land for redistribution purposes is the determination of a negotiated price or just and equitable compensation. It is in this context that the roles of both the OVG and the court becomes important.

3 3 5 2 The determination of compensation for land reform purposes

As mentioned in Chapter 5, the precise role of the OVG, and the relationship, duties and responsibilities of the court *vis-á-vis* the OVG remain unclear. The following proposals regarding the role of the OVG and the Land Court in the process of determining compensation for the acquisition of agricultural land for redistribution purposes are therefore speculative.

Once property (land) is identified for acquisition *via* market-led approaches or expropriation for land reform purposes, the OVG must value the land "for purposes of determining the value of the property having regard to the prescribed criteria, procedures and guidelines".[90] In other words, the OVG must use the formula provided for in the regulations to the PVA to determine the value of the property. In determining the "value"[91] of the land, various considerations will be taken into account, including the market value of the property. Market value is but one of the factors which the Valuer-General must take into account. The other

[87] T Kepe & R Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 03-07-2019) 84-85.

[88] See Chapter 5, 3 2 3 1 above.

[89] Kepe & Hall "Land redistribution in South Africa" *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* (28 September 2016) 84-85.

[90] Section 12(1)(a) of the Property Valuation Act 17 of 2014. See also E (WJ) du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen (eds) *Rethinking Expropriation Law III: Fair Compensation* (2018) 189-220, 213.

[91] Section 1 of the Property Valuation Act 17 of 2014 specifically provides for a definition of "value" and "market value" and which considerations may be taken into account for determining the value.

considerations, similar to those listed in section 25(3) of the Constitution,[92] include the current use of the property; the history of the acquisition and the use of the property; the extent of direct State investment and subsidy in the acquisition and the beneficial capital improvement of the property and the purpose of the acquisition. Accordingly, while the aim is to establish the value of the land,[93] this value may be indicative of the amount of compensation which should ultimately be awarded to a land owner for land acquired for redistribution purposes. Alternatively, it could be equated, *prima facie* with just and equitable compensation because the same considerations are considered.

However, while the same factors listed in section 25(3) of the Constitution for determining just and equitable compensation are considered in determining *value*, the PVA does not state that the OVG makes a decision as to the compensation to be paid, nor that the Minister of Agriculture, Land Reform and Rural Development is bound by the decision. In this context, Pienaar postulates that the determination of the OVG can be used as a *guideline* for acquiring property for land reform purposes but that neither the Minister nor the court is bound by such a determination.[94] Accordingly, the Minister may use this value determined by the OVG as a compensation offer to land owners whose property have been identified for acquisition for land reform purposes.[95] Such an offer may be made during sale negotiations or as part of the expropriation process. However, it is not clear where in the expropriation process[96] the valuation in terms of the PVA fits in. Arguably, the determination of the value of the property can be used as the compensation offered in terms of the notice of intention to expropriate and "later (if needed) in the expropriation notice".[97]

Section 25(2)(b) of the Constitution makes it clear that compensation "must either have been agreed [to] by those affected or decided or approved by a court". Only if the land owners accept the compensation offer or it is approved by a court, will the determination of value by the OVG be binding.

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[92] Pienaar *Land Reform* 363.
[93] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 74, 81.
[94] See JM Pienaar "Land Reform: January to March" (2019) 1 *Juta Quarterley Review* 1-6.
[95] Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" *Rethinking Expropriation Law III: Fair Compensation* 204.
[96] The expropriation process consists of the following stages: the investigation and valuation property; the intention to expropriate; the notice of expropriation and the determination of just and equitable compensation. See Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 205; J van Wyk "Compensation for land reform expropriation" (2017) *Tydskrif vir die Suid-Afrikaanse Reg* 21-35.
[97] Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" *Rethinking Expropriation Law III: Fair Compensation* 213.

However, where the compensation offer is rejected, it may be challenged in court. In this light, the LCC held that "a court cannot be bound to accept a *value* determined by the OVG as the amount of *compensation* for an expropriation".[98] The value of the property determined by the OVG may be equal to just and equitable compensation in some cases, but should not be equated with one another in all cases.[99] Du Plessis explains that "value" is determined by valuation techniques whereas the determination of just and equitable compensation is determined on the basis of justice and equity.[100] The LLC recently held that the:

> "[V]aluation guidelines prescribed by the Valuation Regulations could…result in valuations which are lower than just and equitable compensation as provided for by the Constitution and which can be in conflict with the definition of value in the Property Valuation Act".[101]

Therefore, the valuation report of the OVG cannot oust the jurisdiction of the court but may be used by the court as a guideline for determining just and equitable compensation.

It is reiterated that "just and equitable" compensation, as determined by a court, could be significantly lower than market value compensation and still be constitutional. Notably, in India, the amount of compensation payable to a land owner for land acquired for redistribution under the ceiling-legislation, is generally below market value.[102] Accordingly, the State may expropriate land for redistribution purposes, against compensation lower than market value provided that it is just and equitable as the Constitution is currently formulated.

3 3 5 3 Amending the Constitution

The issue of a suitable approach to acquiring agricultural land for redistribution purposes cannot be discussed without reference to the question of amending the Constitution to provide for expropriation without compensation. The *Land Reform Report* holds that:

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[98] Own emphasis. *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>(accessed 11-09-2019) para 36.
[99] Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" *Rethinking Expropriation Law III: Fair Compensation* 204.
[100] Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" *Rethinking Expropriation Law III: Fair Compensation* 204.
[101] *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban para 35.
[102] Hanstad *et al* "Learning from old and new approaches to land reform in India" in *Agricultural Land Redistribution: Toward Greater Consensus* 246.

> "[I]f the purpose of the constitutional amendment is to move away from the mandatory compensation-based requirement in certain circumstances, then it may be necessary to amend the Constitution by inserting a new section which may read as follows: Parliament must enact legislation determining instances that warrant expropriation without compensation for purposes of land reform…".[103]

This would entail promulgating legislation, such as the Expropriation Bill, which should provide clearly for circumstances and categories of land which may warrant expropriation without compensation. However, if the aim of a constitutional amendment to section 25 is to allow for expropriation without compensation "wholescale and without conditions, then such a motion would offend against section 1 of the Constitution and would in effect, collapse the core underlying values of our Constitution".[104]

3 3 5 4 The possibility of nil compensation in terms of the Expropriation Bill

The Expropriation Act 63 of 1975 predates the 1996 Constitution and its use does not align with the transformative mandate of the Constitution.[105] The Act also "uses market-based compensation with an added solatium",[106] which is contrary to the determination of "just and equitable" compensation in section 25(3) of the Constitution.[107] In this regard, it is proposed that the 1975 Expropriation Act be repealed and that the new Expropriation Bill be finalised. As mentioned in Chapter 5,[108] the Expropriation Bill provides for the determination of "just and equitable" compensation, with reference to the factors in section 25(3) of the Constitution. It also makes provision for categories of land which may be expropriated for redistribution purposes for nil compensation.[109] However, as discussed in Chapter 5,[110] the Bill is still vague in relation to "(a) the scope of the categories and (b) the result," [111] in that some compensation may still have to be paid even if the land is categorised as falling under section 12(3).

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[103] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 72.
[104] 72.
[105] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 71, 80.
[106] 80.
[107] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 71. See also Chapter 5, 3 2 3 4 above for a discussion of the various categories of land in this regard.
[108] See Chapter 5, 3 2 3 4 above.
[109] Clause 12(3) of the Draft Expropriation Bill B-2019 in *GG* No 42127 of 21-12-2018. Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 95.
[110] See Chapter 5, 3 2 3 4 above.
[111] Pienaar (2018) *JQR* 2.

The *Land Reform Report* also proposes a wider array of circumstances or categories of land under that may be acquired for redistribution against nil compensation:

> "including but not limited to: (a) abandoned land; (b) hopelessly indebted land; (c) land held purely for speculative purposes; (d) unutilised land held by state entities; (e) land obtained through criminal activity; (f) land already occupied and used by labour tenants and former labour tenants; (g) informal settlements areas; (h) inner city buildings with absentee landlords; (i) land donations (as a form of EWC); and (j) farm equity schemes".[112]

Interestingly, these categories of land are similar to the criteria used to determine the suitability of land to be expropriated for land reform purposes by the Provincial Land Commission.[113] To avoid potential disputes regarding the categorisation of land that may arise if the Expropriation Bill is promulgated, it is therefore recommended that the scope of the categories of land that may be expropriated for nil compensation be further explored and clarified in regulations to the Expropriation Bill or part of the regulations under the PVA.

It is also unclear what the role of the OVG or the use of the determination of value will be in cases where nil compensation may be payable. Because the Expropriation Bill only makes provision for categories of land which may be expropriated for nil compensation, the court will still have to confirm or determine if it is just and equitable, having regard to the circumstances, to do so. Where the court finds that payment of nil compensation is not just and equitable, the determination of the value of the property by the OVG may still be useful as a guideline to determine just and equitable compensation. Accordingly, the court will still need to determine whether (a) the property falls within the categories of land provided for in the Expropriation Bill; and (b) whether it is just and equitable to pay nil compensation for the property.

Importantly, the redistribution process may continue even if an amount for compensation has not been finalised yet. "Even though compensation is a requirement for a valid expropriation, the amount need not to be determined and paid before ownership can

[112] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 80.
[113] See 3 3 4 above.

vest".[114] However, having regard to the time and manner of payment, compensation still needs to be paid within a "just and equitable" time.[115]

3 3 6 Land Depository

Once the land is acquired by the State *via* market-led approaches or expropriation, the land should be deposited into a Provisional Land Depository, as proposed by the *Land Reform Report*.[116] The Land Depository is proposed to keep a proper record of all of land parcels contributed, including donations.[117] Land can also be returned to the Land Depository where beneficiaries either fail to use the land productively, or intend to sell it. The State can also acquire the agricultural land in cases where beneficiaries fail to use the land productively, or intend to sell it. Land in the depository will be State-owned, until ownership thereof is (possibly) transferred to intended beneficiaries.

3 3 7 A National Redistribution Policy or Bill

3 3 7 1 Introduction

Once the land is identified as suitable for acquisition and redistribution and the land is acquired by the State by way of a market-led approach or expropriation, the land needs to be redistributed. Act 126 makes provision for the designation of (agricultural) land for redistribution, but it does not provide for regulations or guidelines on qualifying and selection criteria or a process for identifying and selecting beneficiaries. The Regulation Bill also does not make provision for details pertaining to the redistribution process – it only stipulates that agricultural land obtained under the Regulation Bill should be redistributed.[118] In other words, there is also no single, coherent policy, scheme or law which provides for guidelines on the qualifying criteria; selection criteria or the selection process of beneficiaries. Accordingly, linked to the determination of the national land demand or needs, is the determination of: (i) who the beneficiaries ought to be;[119] (ii) how they ought to be selected;

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[114] Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 193.
[115] Section 25(3) of the Constitution of the Republic of South Africa, 1996; *Haffejee NO v eThekwini Municipality* 2011 6 SA 134 (CC). See also ZT Boggenpoel "Compliance with section 25(2)(b) of the Constitution: When should compensation for expropriation be determined?" (2012) 129 *South African Law Journal* 605-620; Du Plessis "How the determination of compensation is influenced by the disjunction between the concept of 'value' and 'compensation'" in *Rethinking Expropriation Law III: Fair Compensation* 193.
[116] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 57.
[117] 57.
[118] Clause 26 of the Regulation of Agricultural Land Holdings Bill.
[119] Aliber "How can we promote a range of livelihood opportunities through land redistribution" (13 March 2019) *Working Paper 58 PLAAS*, UWC, Cape Town 4 avers that: "One of the key failings of redistribution to date has been to not be clear as to who is targeted to benefit from it, or to actually apply whatever targeting/categorisation scheme has been proposed."

(iii) what quantity of agricultural land they ought to receive and; (iv) what type of rights the beneficiaries of the redistribution programme ought to receive. In this regard, it is proposed that the Redistribution Policy or Bill set out who the beneficiaries of the redistribution are; determine qualifying and selection criteria and develop a selection process. The Policy or Bill also needs to determine what quantity of land the beneficiary will acquire and what rights he or she will obtain in relation to the land.

3 3 7 2 The right to have access to land

Section 25(5) of the Constitution provides that the State must foster conditions that will enable citizens to gain access to land on an equitable basis. Again, while this right includes broadening access to urban and rural land, the focus falls on agricultural land specifically. Despite this constitutional obligation, no policy or law has been enacted to define this right.[120] Accordingly, it is recommended that, from the outset, the Redistribution Policy or Bill should clarify and give content to the right in section 25(5) of the Constitution. As mentioned in Chapter 1,[121] access to land does not necessarily imply that ownership should be granted. It is proposed that the Redistribution Policy or Bill should align the concept of "redistribution" with the notions of "access to land". Accordingly, coupled with conceptualising redistribution, it should be clear what the aims and proposed outcome of the redistribution programme are. For example, is the aim of the redistribution programme to diversify ownership patterns or is to ensure rights in relation to the land (urban or rural) for beneficiaries of the redistribution programme?

In relation to the determination of the aims and outcome of the redistribution programme, the land needs and demands of previously disadvantaged citizens, as proposed above, should be determined by way of a national survey. These land needs and demands may also provide content to the right in section 25(5) of the Constitution and pave the way for determining whom the beneficiaries should be and what type of rights the beneficiaries should receive. For example, the land needs or demands may indicate that transfer of ownership is required as part of the concept of redistribution or that tenure security is sufficient to hold that redistribution has occurred.

Importantly, the proposed Redistribution Policy or Bill should acknowledge that:

[120] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 33.
[121] See Chapter 1, 2 2 above.

> "Land demand, or need, is differentiated and geographically distinct – people in different areas need different types of land in different size parcels for different purposes".[122]

In line with the proposed national survey, it should be determined if the potential beneficiary requires land or settlement (residential) and/or subsistence; small-scale; medium-scale or large-scale farming purposes. For purposes of this dissertation, it is reiterated that the focus falls on beneficiaries wanting or needing land for agricultural purposes.

3 3 7 3 The beneficiaries

As mentioned above, the *White Paper* provided that land redistribution should assist the urban and rural poor including, farmworkers, labour tenants and emergent farmers for residential and farming purposes.[123] The *White Paper* also provided that:

> "The most critical and desperate needs will command government's most urgent attention. Priority will be given to the marginalised and to women in particular".[124]

However, having regard to the different schemes and policies over the last 22 years, it is unclear who the beneficiaries of the redistribution programme ought to be.

The *Land Reform Report* highlights that "the vast majority of South Africans are eligible for land reform"[125] and it emphasises that there should be "strong criteria for eligibility, prioritisation and selection".[126] Furthermore, the *Land Reform Report* identifies a variety of potential people needing and wanting access to land, including:

> "evictees from farms and from other settlements; farm dwellers; labour tenants; landless livestock owners; commonage users on overstocked commonage land; residents of informal settlements and backyard shacks; people occupying or encroaching on public or private land; young, employed black youth unable to access property markets; the black unemployed and urban dwellers; small emerging entrepreneurs; and aspirant black commercial players".[127]

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[122] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 55.
[123] Department of Land Affairs, *The White Paper on South African Land Policy* (1997).
[124] Department of Land Affairs, *The White Paper on South African Land Policy* (1997).
[125] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 56, 94.
[126] 82.
[127] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 18, 55-56.

The variety of people wanting or needing agricultural land will also become apparent once the national land demand or need survey is completed. From the survey, it should therefore become apparent who the target groups of the redistribution programme should be. In light of the *White Paper*, vulnerable groups should still be targeted, prioritising Black people, specifically women, the youth (35 years old and below) and people with disabilities,[128] working or residing on farms.[129] Importantly, not every person falling within the target group will receive land or rights in relation to the land. The survey will only provide a tentative indication of potential beneficiaries. Further, qualifying and selection criteria, coupled with a transparent selection process, must still be developed to identify specific beneficiaries.

In this regard, the Redistribution Policy or Bill should provide for threshold requirements. It is recommended that potential beneficiaries under the redistribution programme must (a) be a Black South Africa citizen; (b) be at least 18 years of age; (c) must have been previously disadvantaged;[130] (d) have no more than 150 large stock units or 800 small stock units;[131] and (d) not own any land, other than for residential purposes.[132]

Importantly, if a person meets the qualifying criteria, it does not mean that such a person will receive land or rights in relation to the land automatically.[133] Once the targeted groups meet the qualifying criteria, various other criteria are used to select the most appropriate beneficiary for a particular parcel of land identified as suitable for redistribution purposes. The Redistribution Policy or Bill should also make provision for selection criteria.

Aliber provides that the selection criteria should also be developed in relation to the purpose for which a beneficiary wants to acquire a parcel of land. He proposes that a differential approach to selection criteria be developed depending on intended use of the land by the

[128] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 26, 37-39, 56.
[129] For example, in India people working and/or residing on the land, namely the *bargardar* were prioritised as beneficiaries under the land ceiling legislation.
[130] Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (4 May 2019) 12, 56, 105.
[131] Beneficiaries owning more than 150 large stock units or 800 small stock units qualify for a loan under AALS provided that they meet all the other requirements of the scheme.
[132] Ministry of Lands, Resettlement and Rehabilitation *Resettlement Criteria* <http://209.88.21.57/documents/20541/88025/Resettlement_Criteria.pdf/88db4b77-0fb4-472a-a271-8a8441c5ce4d> (accessed 06-02-2019) 2; Ministry of Lands, Resettlement and Rehabilitation National Resettlement Policy (July 2001) 5.
[133] Ministry of Lands, Resettlement and Rehabilitation *Resettlement Criteria* 2.

potential beneficiary.[134] Again, for purposes of this dissertation, the recommendations are restricted to land acquired for agricultural purposes. Accordingly, where land needs/demands relate to agricultural land, beneficiaries should be able to farm productively. In this regard, it is proposed that the selection criteria should be the same or similar to those formulated in the NRP in Namibia, namely (a) agricultural background; (b) age; (c) gender; (d) generational farm workers,[135] such as labour tenants;[136] (e) literacy; (f) current agricultural income (number of livestock); and (g) applicants from communal areas.[137] Applicants are then scored in relation to these criteria. It is acknowledged that, as with identifying suitable agricultural land, the scoring system may not be the best way of finding the most suitable beneficiary, but it allows for a transparent and uniform procedure in selecting eligible beneficiaries. Each Provincial Land Commission will then be responsible for dealing with the applications and selection of beneficiaries.

3 3 7 4 The size of the land

The size of the land redistributed to the beneficiaries will depend on whether the land will be used for settlement and/or subsistence, small-scale, medium-scale or large-scale farming**.** It also depends on the land that may become available if land ceiling legislation is implemented in South Africa and on the type of land identified as suitable for redistribution purposes.

Aliber proposes the following very simple and rough categorisation for distributing different size parcels of land, depending on the purpose for which it is intended to be used: For settlement-orientated purposes, beneficiaries should receive “roughly 0.1 to 1 hectare per household”.[138] For subsistence and/or small-scale farming purposes, “roughly 1 to 50 hectares per household of arable land”[139] should be allocated to beneficiaries. For large-scale farming purposes, beneficiaries should receive “roughly 50 to 500 hectares per household for arable”.[140] He proposes that the land should be awarded per household and

[134] Aliber “How can we promote a range of livelihood opportunities through land redistribution” (13 March 2019) *Working Paper 58 PLAAS*, UWC, Cape Town 7, 10.
[135] Generational farm workers are generally considered to be those persons who have been working on a farm for a least a generation or longer, often leaving them with not roots in any other settlement area, village, town or city.
[136] Notably, this selection process may run concurrently with the application for ownership of land under chapter 3 of the Land Reform: Labour Tenants Act 3 of 1996.
[137] Ministry of Lands, Resettlement and Rehabilitation *Resettlement Criteria* 5-7.
[138] Aliber “How can we promote a range of livelihood opportunities through land redistribution” (13 March 2019) *Working Paper 58 PLAAS*, UWC, Cape Town 5-6.
[139] 5-6.
[140] 5-6.

not per individual as proposed by the Regulation Bill. As mentioned above,[141] it may be difficult to formulate what constitutes a "family", or in this case, "a household". It is thus recommended that this aspect be researched and explored further.

3 3 7 5 Rights of beneficiaries

The type of rights the beneficiaries will acquire in relation to the land, directly relates to conceptualising redistribution under a National Redistribution Policy or Bill. As mentioned above, the South African government needs to provide content to the right in section 25(5) of the Constitution. If it is decided that redistribution entails changing ownership patterns, then the beneficiaries should receive ownership of the land in the form of title or at the very least, should receive ownership of the land after a determined lease period.[142]

However, if redistribution is conceptualised as broadening access to land by providing secure tenure at the very least, then it may be argued that the approach to awarding rights in relation to the land may be differential. This differential approach will depend on the size and the purpose for which the land is acquired by the beneficiary. This approach will also be dependent on the content given to section 25(5) of the Constitution. The SLLDP already provides for different categories of beneficiaries and different types of rights depending on the purpose for which the beneficiary will use the land. For example, if the beneficiary intends to use the land for settlement and subsistence or small-scale farming,[143] then the beneficiary will be entitled to a lease with the State without the option to purchase the land.[144] Aliber argues the inverse. He suggests that where the beneficiary intends to use the land for settlement and subsistence or small-scale farming, the possibility of project failure is so low that the beneficiary should be granted title.[145] However, if the beneficiary intends to use the land for medium-scale or large-scale farming purposes under the SLLDP,[146] the beneficiary will be entitled to a limited real right, namely a lease for a period of 30 years, with the option

[141] See 3 2 4 1 above.
[142] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013) 13.
[143] B Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in B Cousins & C Walker (eds) *Land Divided Land Restored* (2015) 253; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013) 13; Pienaar *Land Reform* 256-257.
[144] Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013).
[145] Aliber "How can we promote a range of livelihood opportunities through land redistribution" (13 March 2019) *Working Paper 58 PLAAS*, UWC, Cape Town 12-13.
[146] Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013) 13; Pienaar *Land Reform* 256-257.

to renew the lease for another 20 years, and with the option to purchase.[147] It is opined that this is not necessarily practical, because beneficiaries may be 70 years old or older by the time they receive ownership of the land.[148] It is recommended that long-term leases should be registered and that the option to purchase should be made available after a shorter time period. For example, in terms of Namibia's land use models, specifically the HEVM, beneficiaries that receive high value agricultural land are given the option to purchase the land after 10 years.

Furthermore, where the rights of beneficiaries in terms of the Redistribution Bill or Policy are infringed, such parties may approach the Land Court for appropriate relief. For example, if a beneficiary is afforded the option to purchase the land after 10 years, but the State fails to administer the process, the beneficiary may approach the court for an order directing the State to effect such a transfer of ownership.[149]

Ultimately, it is recommended that a differential approach is required for determining what type of right in relation to the land the beneficiary will obtain under the redistribution programme. As explained, the type of right awarded to the beneficiary is dependent on the purpose for which the beneficiary will use the land, namely subsistence, small-scale, medium-scale or large-scale farming.

4 Conclusion

The unequal distribution of agricultural land remains prevalent after 25 years of democracy in South Africa. It is clear that various constitutional objectives have to be met in formulating a constitutional and effective legal framework for the redistribution of agricultural land. On the one hand, the State must foster conditions which will enable citizens to gain access to land on an equitable basis, without arbitrarily depriving land owners of their private property rights.[150] On the other hand, the State must also promulgate reasonable regulatory measures which aim to secure ecologically sustainable development and use of natural

[147] Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy* (2013) 25; Cousins "'Through a glass darkly': Towards agrarian reform in South Africa" in *Land Divided Land Restored* 253.
[148] However, see *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the State failed to convert the tenuous land rights of a 78 year old Black farmer, who was initially offered to purchase the land and become owner thereof in 2003 under the LRAD programme.
[149] See for example, *Rakgase v Minister of Rural Development and Land Reform* (33497/2015) [2019] ZAGPPHC (4 September 2019) where the High Court ordered the State to transfer ownership of the land to Mr Rakgase.
[150] Section 25(1) read with section 25(5) of the Constitution of the Republic of South Africa, 1996.

resources, including in relation to agricultural land, for present and future generations.[151] The challenge lies in drafting and implementing pertinent policy and legislative measures dealing with agrarian reform which allows for the redistribution and preservation of agricultural land. In other words, agricultural productivity, development and food security may not be compromised and the regulatory measures employed have to be aligned with the provisions of the property clause, section 25 of the Constitution.[152]

This dissertation set out to determine (a) to what extent the South African government may interfere with and regulate private property rights in relation to agricultural land for redistribution purposes; and (b) how the South African government should conceptualise, regulate, acquire and redistribute agricultural land to promote land reform, particularly redistribution goals without impeding agricultural productivity? The former question entailed a determination of whether the current and envisaged regulatory measures aimed at regulating agricultural land are constitutional, whereas the latter question explored different options for the conceptualisation, regulation, acquisition and redistribution of agricultural land in South Africa.

The South African government may interfere with and regulate private property rights to the extent that it does not amount to an arbitrary deprivation of property. The different regulatory mechanisms discussed in this dissertation, namely (a) restrictions on the subdivision of agricultural land; (b) land ceilings; and (c) restrictions pertaining to the regulation of foreign ownership were found to be constitutional, because the mechanisms do not arbitrarily deprive a land owner of his or her property. Where the deprivation is not arbitrary, the interference may still amount to an expropriation of property. In such cases, the requirements for an expropriation need to be fulfilled for it to be valid. As mentioned throughout this dissertation, the possible amendment to the Constitution and the possible promulgation of recent legislative measures, may allow for nil compensation in cases where (agricultural) land is acquired for redistribution purposes. Such an amendment will allow for different constitutional parameters, as is currently envisaged by section 25 of the Constitution. While such an amendment may contribute to making the redistribution programme more affordable, it will not necessarily speed up the slow pace of redistribution in South Africa.

[151] Section 24 of the Constitution of the Constitution of the Republic of South Africa, 1996.
[152] Section 25(1) of the Constitution of the Republic of South Africa, 1996; Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” (4 May 2019) 5.

Instead, the slow pace of the redistribution programme can be attributed to the fact that no coherent and effective framework for the regulation of agricultural land for redistribution purposes exists in South Africa. As Pienaar summarises, the redistribution programme has thus far been characterised by a:

> "shift in focus and cycles of redistribution, both with regard to aims and goals, on the one hand, and the relevant tools and mechanics, on the other. Basic fairness in broadening access to land was gradually superseded by demands for sustainable development; and livelihood enhancement was overshadowed by the promotion of successful commercial farming…Increasingly, redistribution became caught up between different paradigms: justice and reparation, on the one hand, and development and commercial success on the other".[153]

While it is clear that initial programmes such as SLAG and LRAD focused on the poorest of the poor, later projects such as PLAS and the SLLDP with the aim of enabling commercial farming, focused on more resourced and more competent beneficiaries, such as emerging Black farmers.[154] This shift in focus can further be characterised as a shift from demand-led acquisition and redistribution of agricultural land to supply-led acquisition and redistribution of agricultural land. The redistribution programme is also multi-dimensional and "involves various arms of government, government departments, organs of State, State institutions as well as private individuals, non-government organisations and a multitude of other players".[155]

While it is acknowledged that it is extremely complex to plan, regulate, implement and monitor redistribution,[156] it is proposed that an overarching and coherent framework for redistribution is required for the successful and effective implementation of the redistribution programme as a whole. It is in this context that the following main components are proposed, aligned with a comprehensive Redistribution Policy or Bill: (a) a national land audit that is correct and reliable; (b) a land need or demand survey; (c) the establishment of a National Agricultural Land Register, comprised out of nine Provincial Agricultural Land Registers; (d) the development of criteria for identifying suitable agricultural land for redistribution purposes; and (e) the creation of a Land Depository. A new legal framework for the

[153] Pienaar *Land Reform* 832.
[154] Pienaar *Land Reform* 832-833. See also Chapter 5 above.
[155] Pienaar *Land Reform* 830.
[156] Pienaar *Land Reform* 830.

regulation of agricultural land also requires an effective land administration system and warrants the creation of the following bodies or institutions, involved at various stages of the redistribution process: (a) a National Land Commission; (b) nine Provincial Land Commissions; and (c) a newly constituted Land Court.

The Redistribution Policy or Bill should set out: (a) what the right in section 25(5) of the Constitution entails; (b) what the target or aims of the redistribution programme are; (c) what approach, expropriation or otherwise, should be followed in acquiring agricultural land; and (d) what the benefits of the redistribution programme should be, including (i) who the beneficiaries ought to be;[157] (ii) how they ought to be selected; (iii) what quantity of agricultural land they ought to receive and; (iv) what type of rights the beneficiaries of the redistribution programme ought to receive.[158]

Given the temporal nature of the land reform programme as a whole, and the redistribution programme in particular, continuous adaptations to the regulatory framework may be required[159] having regard to the changing and differential land needs and demands of the citizens of South Africa.

[157] Aliber "How can we promote a range of livelihood opportunities through land redistribution" (13 March 2019) *Working Paper 58 PLAAS*, UWC, Cape Town 4.
[158] Pienaar *Land Reform* 832.
[159] Pienaar *Land Reform* 828-829.

Annexures

Annexure A: A legal framework for the redistribution of agricultural land in South Africa

	Phases	**Responsible Institution/Body**	**Mechanism**
Phase 1	National Land Audit	National Land Commission and Deeds Office	➢ Audit
Phase 2	National Land demand/need survey	National Land Commission	➢ Survey ➢ Database
Phase 3	Identification of suitable agricultural land	Provincial Land Commission	➢ Agricultural Land Register ➢ Criteria for identifying suitable agricultural land
Phase 4	Acquisition of suitable agricultural land	Minister of Agriculture, Land Reform and Rural Development/ Delegate	➢ Market-led approaches ➢ Expropriation
Phase 5	Land Depository	Provincial Land Commission	➢ Database of all available parcels of land
Phase 6	Redistribution of agricultural land	Provincial Land Commission	➢ Redistribution Bill or Policy, setting out: ✓ Qualifying and selection criteria of beneficiaries ✓ The size of the parcel of land which should be awarded ✓ The rights beneficiaries will obtain

Annexure B: Department of Agriculture, Land Reform and Rural Development: Role players in the redistribution process

Institution/Body	**Role/responsibility**
National Land Commission	• Conduct National Land Audit in cooperation with Deeds Office. • Conduct national land demand/need survey. • Disseminate information to Provincial Land Commission. • Monitor/oversee Provincial Land Commissions. • Monitor/oversee Land Depository
Provincial Land Commission	• Define agricultural land per province. • Establish and maintain Agricultural Land Register under the proposed Agricultural Land Bill. • Determine what constitutes “protected agricultural areas”. • Determine the land ceiling for agricultural land per region. • Identify suitable agricultural land for acquisition. • Conduct social impact assessment. • Establish rehabilitation and resettlement scheme. • Acquire agricultural land as delegate of/with assistance of the Minister of Agriculture, Land Reform and Rural Development. • Maintain Land Depository. • Redistribute agricultural land in line with Redistribution Bill or Policy.
Office of the Valuer-General	• Valuation of land identified as suitable for redistribution purposes by the Provincial Land Commission. • Submit valuation to Minister of Agriculture, Land Reform and Rural Development or delegate (Provincial Land Commission) • Provide information to Land Court as and when relevant
Land Court	• Resolve disputes emanating from promulgation and implementation of proposed Agricultural Land Bill, including: ✓ Whether land constitutes “agricultural land”

	✓ Whether land may be subdivided ✓ Whether the land in question falls within the ceiling limit • Resolve disputes pertaining to the determination of just and equitable compensation when challenged. • Enforce and protect rights awarded to beneficiaries under the proposed Redistribution Bill or Policy.

Acronym list

AALS	Affirmative Action Loan Scheme
ACLRA	Agricultural (Commercial) Land Reform Act
ALPF	Agricultural Landholding Policy Framework
CLARA	Communal Land Rights Act 11 of 2004
CLRA	Communal Land Reform Act 5 of 2002
CLTP	Communal Land Tenure Policy
CRC	Constitutional Review Committee
CPA	Communal Property Association
DAFF	Department of Agriculture, Forestry and Fisheries
DALRRD	Department of Agriculture, Land Reform and Rural Development
DRDLR	Department of Rural Development and Land Reform
FURS	Farm Unit Resettlement Scheme
HEVM	High Economic Value (Commercial) Model
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996
LEVM	Low Economic Value (Commercial) Model
LGTA	Local Government Transition Act 209 of 1993
LLC	Land Claims Court
LRAD	Land Redistribution and Agricultural Development
MEC	Member of the Executive Council
MEVM	Moderate Economic Value (Commercial) Model
NEF	National Empowerment Fund
NMMM	Nelson Mandela Metropolitan Municipality
NRP	National Resettlement Policy/Scheme
NRR	National Rehabilitation and Resettlement
OCSLA	Office of the Chief State Law Advisor
OVG	Office of the Valuer-General

PAJA	Promotion of Administrative Justice Act 3 of 2000
PLAS	Proactive Land Acquisition Strategy
PVA	Property Valuation Act 17 of 2014
RFTLARRA	Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 30 of 2013
SALA	Subdivision of Agricultural Land Act 70 of 1970
SC	Scheduled Caste
SLAG	Settlement/Land Acquisition Grant
SLLDP	State Land Lease and Disposal Policy
SPLUMA	Spatial Planning and Land Use Management Act
ST	Scheduled Tribe
WBLRA	West Bengal Land Reform Act 10 of 1956
WBWS	Willing-buyer-willing-seller

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